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WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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Sanborn Motion – Presumptions – Jury Instruction

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION FOR SANBORN INSTRUCTION

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and JOHN W. HELZER, Assistant District Attorney, to submit this "Opposition To Motion For Sanborn Instruction." The State's opposition is set forth in the accompanying Discussion.

DISCUSSION

In further support that the requests of the defendant are unfocused and premature, the State would refer to the authority cited by counsel for the defendant. This authority focuses almost exclusively on statutory presumptions and the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

The consideration of instructing a jury on a presumption is an involved process and should occur only after the evidence has been fully developed. Any request that a presumption be set forth in an instruction must be specific. Additionally, that request will necessarily involve an in-depth analysis by the Court. In support that this process must be specific and requires an in-depth analysis, are NRS 47.180 (Presumptions generally: Effect; direct evidence.), NRS 47.190 (Determination of evidence of basic facts.), NRS 47.200 (Determination on evidence of presumed fact: Where basic facts established.), NRS 47.210 (Determination on evidence of presumed fact: Where

basic facts lacking.), NRS 47.220 (Determination on evidence of presumed fact: Where basic facts doubtful.), NRS 47.230 (Presumptions against accused in criminal actions). Juries must not be instructed in the general overly broad manner that defense requests. The defendant must make a request that is specific, and the Court must make findings as to that specific request. In addition to the statutes previously referred to, the Sanborn decision relied on by the defendant supports the requirement of specificity.

In Sanborn the Court specifically found that the State's mishandling of a gun resulted in a loss of evidence of blood and fingerprints. With the loss of this evidence, the defendant's claim of self-defense rested almost exclusively on his own testimony. The Court found that if the defendant's testimony was true, the evidence of the blood and fingerprints on the weapon could have been critical corroboration of the claim of self-defense. The Court further found that the State's case was enhanced by the absence of any blood or fingerprint evidence. After these specific findings, the Court held that the State could not benefit from its failure to preserve this evidence. It was after these very specific findings were made that the Court proceeded to indicate what instruction would be given.

Sanborn does not support the general unspecified request now made by the defendant. The proposed instruction was very narrowly drafted and was only ordered after there was a specific showing of a critical need for the evidence by the defendant and a finding that the State benefitted from its actions resulting in a loss of that evidence. Sanborn did not result in the creation of generally accepted instruction.

For the reasons set forth above, the State would respectfully submit that the Court delay any decision concerning the requested instruction until after the presentation of evidence in the case is concluded. The State would further request that prior to making any determination about the requested instruction that the process set forth in Chapter 47 of the Nevada Revised Statutes and in the Sanborn decision take place. Finally, the State would request that if, after a focused hearing, there is determined to be justification for an instruction concerning any evidence presented, that the instruction be drafted in a manner consistent with the specificity set forth in the Nevada Revised Statutes and the Sanborn decision.

Respectfully submitted this ____ day of May,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing at Reno, Washoe County, Nevada, a true copy of the foregoing document, addressed to:

JoNELL THOMAS, ESQ
STATE BAR NO. 4771
302 EAST CARSON AVE., 3RD FLOOR
LAS VEGAS, NV 89101

ROBERT LANGFORD, ESQ.
STATE BAR NO. 3988
WALTON & LANGFORD
550 EAST CHARLESTON BLVD., #A
LAS VEGAS, NV 89104

DATED this ____ day of _____, 2000.

_____

Scientific Evidence Generally DNA

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

ISSUE PRESENTED: IS STATISTICAL EVIDENCE OF DNA TESTING ADMISSIBLE WITHOUT THE TESTIMONY OF A POPULATION GENETICIST?

The Nevada Supreme Court assesses the admissibility of scientific evidence in terms of trustworthiness and reliability. Santillanes v. State, 104 Nev. 699, 704, 765 P.2d 1147, 1150 (1998). The overwhelming weight of authority has established that DNA analysis utilizing the PCR technique Is reliable and trustworthy for use within the forensic context, see United States v. Hicks, 103 F.3d 837, 844-47, (9th Cir. 1996), cert. denied, ____ U.S. ____, 117 S.Ct. 1487 (1997); United States v. Beasley, 102 F.3d 1440, 1444-48 (8th Cir. 1996), cert. denied, ____ U.S. ____, 117 S.Ct. 1856 (1997); State v. Lyons, 924 P.2d 802, 804-14 (Or. 1996); People v. Pope, 672 N.E.2d 1321, 1325-28 (Ill. App. Ct. 1996); State v. Gentry, 888 P.2d 1105, 1117-18 (Wash. 1995).[1] Further, the Nevada Supreme Court has held that DNA results obtained through the use of the PCR technique are

admissible for use within the forensic context. See, Bollin v. State, 114 Nev. 503, 960 P.2d 784 (1998).

Other jurisdictions that have addressed the issue of whether or not a DNA laboratory expert was properly qualified to testify regarding population genetics have held in favor of the State's position. See, United States v. Davis, 40 F.3d 1069, 1075 (1994). In Davis, the Court held, "statistical probabilities are basic to DNA analysis and there use has been widely researched and discussed." After the Court reviewed the qualifications of the government's DNA expert, the Court concluded that the witness could testify "about genetics with the context of DNA evidence." Id., at 1075; see also, State v. Isley, 936 P.2d 275, 280 (Kan. 1997). Here, Jeff Riolo, a Criminalist at the Washoe County Crime Lab, who has testified as an expert in the field of DNA analysis, will provide a statistical analysis of his results. The genetic population statistics adopted by the Washoe County Sheriff's Office Forensic Division DNA section are derived from the National Research Council (NRC). These statistical figures are set forth in a publication generally accepted within the scientific community as approved statistical basis in DNA testing. That publication is entitled, National Research Council, Commission on DNA Forensic Science; The Evaluation of Forensic DNA Evidence (1996).

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[1] Jeff Riolo will use the PCR technique to forensically analyze the DNA in question.

In United States v. Ortiz, 125 F.3d 863 (10th Cir. 1997), a Ms. Ranadive, an employee of Cellmark Diagnostic, did not testify as to the identity of the individual whose DNA was found in their case. She testified as to the probability of finding someone with that specific DNA profile in each of the three ethnic groups for which Cellmark Diagnostic keeps its database. The Court concluded that Ms. Ranadive relied on and based her opinion on the type of data reasonably relied upon by experts in her field. Further, the Ortiz Court cited United States v. Davis, supra, for the proposition that statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed.

Recent cases in almost all federal and state jurisdictions have embraced the statistical probabilities produced in DNA testing. Another example of how the issue has been addressed in the State judicial system is State v. Buckner, 941 P.2d 667 (1997). In Buckner, the Washington Supreme Court reversed its earlier decision involving the admissibility of DNA evidence as it relates to statistical analysis. The Court held that based upon the new NRC criteria, "we now conclude there should be no bar to an expert giving his or her opinion, that, based upon an exceedingly small probability of a defendant's DNA profile matching that of another in a random human population, the profile is unique." The vast majority of appellate court cases since 1996, have embraced the statistical aspect of DNA testing as being generally accepted within the scientific community and a necessary element of DNA testimony. State v. Copeland, 922 P.2d 1304 (Wash. 1996); State v. Hummert, 933 P.2d 1187 (Ariz. 1997) (en banc); State v. Peters, 944 P.2d 896, 903 (N.M. App. 1997); State v. Boles, 933 P.2d 1197, 1200 (Ariz. 1997) (en banc). Finally, the State intends to present the DNA evidence after establishing a reliable foundation. The defense will have an opportunity to cross-examine the State's expert as well as call their own expert to address DNA statistical analysis. Therefore, the question is not whether the evidence should be admissible, the question is what weight a jury would give the evidence during deliberations. See, United States v. Gwaltney, 790 F.2d 1378 (9th Cir. 1996), cert. denied, 479 U.S. 1104 (1987).

The Ninth Circuit has opined that, "Daubert cautioned lower courts not to confuse the role of judge and jury by forgetting that 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' rather than exclusion 'are traditional and appropriate means of attacking shaky but admissible evidence'" United States v. Chischilly, 30 F.2d 1144, 1154 (9th Cir. 1994). The statistical probabilities that will be testified to by Jeff Riolo, assuming the DNA matches the defendant's, should be admitted pursuant to NRS 50.285.

CONCLUSION

DNA statistical evidence has reached the level of acceptance within the scientific community. DNA statistical evidence has been admitted in a number of courts and a population geneticist is not necessary to establish the statistics as they have also been generally accepted in the scientific community along with the acceptance of DNA evidence. In fact, defendant's have appealed the failure to admit statistical evidence in a DNA context. These appeals were unsuccessful. See, Brodine v. State, 936 P.2d 545, 551-52 (Alaska Ct. App. 1997); Sholler v. Commonwealth, 45 K.L.S. 720 (Kent. 96-SC-856-MR, 6/1998).

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____

Deputy District Attorney

Seal Search Warrant and Seizure Order – Motion and Order

IN THE JUSTICE COURT OF SPARKS TOWNSHIP,

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA.

* * *

IN THE MATTER OF THE APPLICATION

FOR A SEARCH WARRANT AND SEIZURE ORDER.

MOTION TO SEAL SEARCH WARRANT AND SEIZURE ORDER DOCUMENTS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and DANIEL J. GRECO, Chief Deputy District Attorney, and hereby requests that this Court enter an Order sealing all Search Warrants/Seizure Orders in Reno Police Department case number and any subsequent Search Warrants/Seizure Orders filed with this Court in this case. Said Motion requests that the sealing include the Search Warrant/Seizure Order, any written or oral affidavits, tape recordings and transcriptions of same and all Returns. It is finally requested that this Motion and Order also be sealed.

Movant submits that the need to seal such documents is based upon the following:

Respectfully submitted this ____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____
Deputy District Attorney

IN THE JUSTICE COURT OF SPARKS TOWNSHIP,

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA.

* * *

IN THE MATTER OF THE APPLICATION

FOR A SEARCH WARRANT OR SEIZURE ORDER.

POINTS AND AUTHORITIES

Where an underlying criminal investigation is ongoing and the release of Search Warrant or Seizure Order materials could seriously jeopardize the integrity of the police investigation, it is appropriate to enter an Order

sealing the Search Warrant or Seizure Order documentation pending completion of the investigation and the filing of charges against an identified individual or individuals. P.G. Publishing v. Com. By Dist. Atty., 566 A. 2d 857 (Pa. Super. 1989). Additionally, there is no constitutional right of public access to search warrant or seizure order documentation in an unfiled criminal case. The Seattle Times Company v. Eberharter, 713 P.2d 710 (Wash. 1986).

The Ninth Circuit Court of Appeals has addressed the issue of public access to search warrant materials during an ongoing criminal investigation. The Ninth Circuit noted initially that there is no historical tradition of public access to search warrant proceedings. Historically, the warrant process in this country has traditionally been carried out in secret

based in part upon the fact that Search Warrants are issued after an ex parte application by the government, and after an in camera consideration by a judge or magistrate. The Ninth Circuit found that the experience of history supported the conclusion that warrant proceedings and materials should not be accessible to the public at least while there is an ongoing investigation and charges have not yet been filed. Times Mirror Company v. United States, 873 F.2d 1210 (9th Cir. 1989). In concluding in this fashion, the Court found that open warrant proceedings involving public access might hinder rather than facilitate the search warrant process and the government's ability to conduct criminal investigations. These concerns included the fact that suspects might flee, that evidence might be destroyed, that suspects and witnesses could coordinate their stories, and that privacy interests of individuals identified in Warrants and supporting affidavits might be held up to public ridicule, even if they were subsequently exonerated when the investigation was completed. Obviously, the logic and rationale supporting this conclusion would be applicable as well to Seizure Orders.

It is submitted that the appropriate procedures concerning the sealing of search warrant and seizure documentation in ongoing criminal investigations is to request the Court to file the documentation under the court's seal. Thereafter, requests to obtain access prior to the time charges are filed against an identified individual or individuals would be heard by the Court with all parties, including the government, in attendance. Baltimore Sun Company v. Goetz, 886 F.2d 60 (4th Cir. 1989); Certain Interested Individuals v. Pulitzer Pub., 895 F.2d 460 (8th Cir. 1990). In the absence of any such request, when an investigation is completed and the suspect or suspects identified and charged, all Search Warrants, Seizure Orders, Affidavits, and documentation relating to the warrant or order would then be unsealed and made available to all interested parties during the course of the court proceedings.

Based on the foregoing, it is requested that an Order enter sealing the SEARCH WARRANT/SEIZURE ORDER any oral or written affidavits supporting same, all tape recordings and transcriptions and Returns filed in this case until such time as charges are filed or further Order of this Court. Additionally, it is requested that this Motion and Order itself be sealed based upon the circumstances cited within said Motion.

Respectfully submitted this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____
Deputy District Attorney

IN THE JUSTICE COURT OF SPARKS TOWNSHIP,
IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA.

* * *

IN THE MATTER OF THE APPLICATION

FOR A SEARCH WARRANT/SEIZURE ORDER.

O R D E R

Based on the Motion of the Washoe County District Attorney's Office to seal all Search Warrants/Seizure Orders filed with this Court as of this date and any subsequent Search Warrants/Seizure Orders which may be filed in this case, together with the Affidavit and Points and Authorities hereto filed in support of same, and good cause appearing,

IT IS HEREBY ORDERED that the Search Warrant/Seizure Order and all written and oral affidavits, tape recordings and transcriptions of same and all Returns, filed with this Court or which may be filed subsequent to this Order are to be sealed.

IT IS FURTHER ORDERED that this Motion and Order is itself also to be sealed.

This Order to Seal shall continue until such time as a Complaint or Indictment is filed against any individual or individuals, unless otherwise ordered by this Court.

DATED this ____ day of _____, .

_____
JUSTICE OF THE PEACE

Search of the Person Terry Pretext Stop

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

OPPOSITION TO MOTION TO SUPPRESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, and ELLIOTT A. SATTLER, II, Deputy District Attorney, and files this OPPOSITION TO MOTION TO SUPPRESS (hereinafter, "Opposition"). The Opposition is pursuant to the United States Constitution, the Nevada Constitution, NRS 171.123, Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526 (1994), Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517 (1983), Oregon v. Mathiason, 429 U.S. 492, 94 S.Ct. 711 (1977), Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972), Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), Miranda v. Arizona, 384 U.S. 436, 85 S.Ct. 1602 (1966), State v. Sonnenfeld, 114 Nev.Adv.Op 73 (1998), State v. Burkholder, 112 Nev. 535 (1996), Gamma v. State, 112 Nev. 833 (1996), State v. Wright, 104 Nev. 521 (1988), Carlisle v. State, 98 Nev. 128 (1982), Rusling v. State, 96 Nev. 773 (1980), Stuart v. State, 94 Nev. 721 (1978), the Points and Authorities attached hereto and incorporated

herein by this reference, all the pleadings, papers and authorities on file with this Court in this action, and any oral argument the Court requires.

Dated this ___ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By:_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

The defendant's motion raises two main issues. Issue "A" addresses the evidence collected during the contact between the police and the defendant. Issue "B" addresses statements made by the defendant during that contact. The State will address the issues in the order presented.

A. ALL OF THE PHYSICAL EVIDENCE SEIZED SHOULD BE SUPPRESSED BECAUSE THE EVIDENCE WAS SEIZED THROUGH UNLAWFUL SEARCH OF DEFENDANT'SPERSON.

The defendant's motion appears to make the broad assertion that all the contact between the defendant and law enforcement during the incident in question was unconstitutional. Clearly, such an assertion is untenable. The initial contact between the defendant and law enforcement was nothing more than a consensual contact between the parties. The Nevada Supreme Court has addressed such a situation in State v.Burkholder, 112 Nev. 535 (1996). In Burkholder RPD officers observed Burkholder conducting himself in a manner consistent with the actions of a drug dealer or user. The officers approached Burkholder and identified themselves. The officers ". . .asked Burkholder if he would answer a few

questions. Burkholder replied 'yes'." Burkholder, 112 Nev. at 537. Burkholder also answered the basic questions put to him without a *Miranda* warning. Id.

In analyzing the situation the Nevada Supreme Court first acknowledges Terry v. Ohio, 392 U.S. 1 (1968), and its progeny. The Court then states, "[m]ere police questioning does not constitute a seizure. Florida v. Bostick, 501 U.S. 429, 434 (1991)." Burkholder, 112 Nev. at 538. The Court goes on to state:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Burkholder, 112 Nev. at 538-39 (quoting Florida v. Royer, 460 U.S. 491, 497 (1983)).

The inescapable conclusion, based on Burkholder, is that the initial contact between the defendant and law enforcement was nothing more than consensual questioning. Any allegation that the law enforcement were in a place they were not allowed to be, or illegally detaining the defendant initially is simply not based on the facts presented.

The defendant's motion claims that the contact was a violation of his Fourth Amendment rights as outlined in Terry, *supra.* Again, the claim is not supported by federal law or the law in Nevada. The defendant's claims in this area are nothing more than a shortsighted glance at a broad issue. When the facts are applied to the law it becomes obvious that the officers did not violate the defendant's rights.

The Nevada Supreme Court has long followed the ruling announced in Terry. There is a two-prong test to determine whether an investigative detention passes constitutional muster:

> [In] determining whether the seizure and search were "reasonable" our inquiry is a dual one--whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

State v. Sonnenfeld, 114 Nev.Adv.Op 73 (1998)(quoting Terry, 592 U.S. at 19-20). The Nevada Legislature has codified this seminal area of constitutional law in NRS 171.123.

In Rusling v. State, 96 Nev. 778, 781 (1980), the Nevada Supreme Court states:

> Even though probable cause may not exist to place a person under arrest, a police officer may, under appropriate circumstances and in proper manner, approach and detain a person for the purpose of

> investigating possible criminal behavior. Terry v. Ohio, 392 U.S.1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968); Stuart v. State, 94 Nev. 721, 722, 587 P.2d 33, 34 (178); Jackson v. State, 90 Nev. 266, 267, 523 P.2d 850, 851 (1974); Wright v. State, 88 Nev. 460, 464, 499 P.2d 1216, 1219 (1972); NRS 171.123(1).

The facts in Rusling are on point with the issues presented in the defendant's motion. The appellant was stopped by Las Vegas police because he resembled a person seen fleeing from an abandoned vehicle. The police searched for the person who fled for approximately one hour. They eventually stopped the appellant because he resembled the person they saw fleeing. *See*, Rusling, 96 Nev. at 780. The Court held that the brief detention and search of the defendant was appropriate. The Court noted that the following factors in coming to this decision:

> Appellant emerged from the area where the police officers had reason to believe the suspect was lurking; he matched the description broadcast by Officer Harber. Officer Shelton was, therefore, justified in approaching appellant and stopping him for the purpose of further investigation.

Id., 96 Nev. at 781.

In State v. Wright, 104 Nev. 521 (1988), the Court again addressed the brief detention associated with a *Terry* stop. The facts are even more attenuated than those in Rusling. In Wright the appellant was driving a vehicle similar to one involved in a robbery that had occurred the previous evening. The vehicle was not the same. The police had information that the robbery suspects were black, yet the occupants of the car were white. Further, the vehicle was only "in the area" of the previous robbery. The police found a bullet in plain view which lead to further contraband. The appellant sought suppression of all evidence based on Terry.

The Nevada Supreme Court held that the officers were correct in briefly detaining the vehicle and its occupants even with these facts. The Court stated:

> A stop is lawful if police reasonably suspect that the persons or vehicles stopped have been involved in criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Stuart v. State, 94 Nev. 721, 587 P.2d 33 (1978); Ildefonso v. State, 88 Nev. 307, 496 P.2d 752 (1972); NRS 171.123. * * * The officers could reasonably decide that vital information could be obtained from examining the vehicle and briefly questioning its occupants. This provided a particularized and objective basis for stopping Wright's vehicle. Cortez, *supra*, 449 U.S. at 417, 101 S.Ct. at 694.

> We conclude that the stop was reasonable and lawful, and did not violate respondent's constitutional rights. The bullet found lying on the floorboard was in plain view; therefore its discovery was not unlawful. California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); Wright v. State, 88 Nev. 460, 499 P.2d 1216 (1972).

Wright, 104 Nev. at 523.

The Nevada Supreme Court has held that it was not a *Terry* violation for officers to stop a vehicle based on a tip from a bar tender. Sonnenfeld, *supra*. The Court has also held that it is not a *Terry* violation to stop a vehicle based only on the fact that the trunk lock was missing. The officer was investigating whether the vehicle was stolen. Marijuana seeds found in plain view were deemed admissible after the stop. Stuart v. State, 94 Nev. 721, 722-23 (1978)("Under these circumstances, we believe the officer's conclusion was reasonable and he was justified in stopping the vehicle for routine questioning and investigation. Since the officer had lawfully attained the position from which he observed the marijuana in plain view, he had a right to seize it and, therefore, the marijuana was properly admitted." (citations omitted)).

The defendant's motion makes a "pretext stop" argument. The defendant attempts to buttress this argument by a reference to Alejandre v. State, 111 Nev. 1235 (1995). In a footnote, the defendant concedes that Alejandre has been directly overruled by both Gamma v. State, 112 Nev. 833 (1996), and Wren v. United States, ___ U.S. ___, 116 S.Ct. 1769 (1996). The State is unable to follow the mental gymnastics which would allow an overruled case to somehow control the issues presented by the defendant's motion. Suffice to say that both Alejandre and Gamma addressed the stop of vehicles for minor violations and subsequent searches. Those issues have no bearing in the present case given the fact that the officers were conducting a legal investigation pursuant to Terry and the defendant's consent.

The defendant's motion claims that the officers did not have a search warrant, consequently they did not have a right to search the defendant's person. This contention ignores the fact that the defendant consented to the search. As discussed, *supra*, consent negates the need for a warrant. Further, given the defendant's strange and unresponsive behavior and the officers knowledge that he had been using a piece of metal to pry the machines, the officers were within the edicts of NRS 171.1232.

A non-invasive "pat search" has long been approved by the United States Supreme Court. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ." Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923 (1972). In Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), the Court held that a pat search for weapons was appropriate simply because a person walked away from officers and entered an alley. There was no indication that there were weapons on the individual. The concern arrose from his evasive behavior and the fact that he had been seen leaving a "notorious 'crack house'." Id., 508 U.S. at 368. The defendant's behavior in the instant case coupled with the officer's knowledge that a piece of metal was involved was enough to give them a right to do a "pat search".

During the "pat search" the officers detected further paraphernalia in the defendant's pockets. They were entitled to remove those items. In Dickerson, *supra*, the Court held:

> "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id., 508 U.S. at 345-76. Nothing that the officers did on September 22, 1997, violated this holding.

The seizure of the drug pipe found in the defendant's back pocket was appropriate. It was in "plain-view", consequently the officers could seize it. The United States Supreme Court has held, "[u]nder that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." Dickerson, 598 U.S. at 375 (citations omitted).

In Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), the United States Supreme Court adopted the inevitable discovery exception to the exclusionary rule. Simply put, the Court held that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means-. . .-then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." Id., 467 U.S. at 444. The Court goes on to point out, "[e]xclusion of physical evidence that would

inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Id., 467 U.S. at 446. The Nevada Supreme Court has also adopted this prevailing concept of constitutional law. In Carlisle v. State, 98 Nev. 128 (1982), the Nevada Supreme Court stated:

> We have held that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence. (Citations omitted).

Id., 98 Nev. at 129-130.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Search Auto Consent

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION TO SUPPRESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Trooper Stop Was Lawful and Justified.

NRS 171.123 provides in pertinent part as follows:

> Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

In Gama v. State, 112 Nev. 833 (1996), the Nevada Supreme Court abolished the concept of pretextual traffic stops, and adopted the "could have" test. As long as an officer makes a lawful traffic stop that is neither unreasonably intrusive, nor unreasonably lengthy, he or she may effectuate a traffic stop for any other reason or purpose, i.e., searching for narcotics.

Trooper made a lawful and justified stop.

C. A Warrant Was Not Necessary to Search The Vehicle Since Brooke and Williams Voluntarily Consented To The Search.

The United States Supreme Court has held that a search of a vehicle only requires probable cause to believe that evidence of a crime is present in a vehicle. See California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985). However, the Nevada Supreme Court adheres to the more stringent requirement that exigent circumstances must be present to justify a warrantless vehicle search. See Barrios-Lomeli, 944 P.2d 791 (1997) (citing State v. Harnisch, 113 Nev. 214, 222 (1997)).

Mere police questioning does not constitute a seizure. State v. Burkholder, 112 Nev. 535, 915 P.2d 886, 888 (1996)(citation omitted). The police may randomly -- without probable cause or a reasonable suspicion -- approach people in public places and ask for leave to search. Id.

For consent to be lawfully obtained, the State must demonstrate that it was voluntarily given. Voluntariness is a question of fact to be determined from the totality of the circumstances. United States v. Cannon, 29 F.3d 472, 477 (9th Cir. 1994) (citing Illinois

v. Rodriguez, 497 U.S. 177, 183-89, 110 S.Ct. 2793, 2798-2802 (1990)). An important factor to consider when determination if consent is voluntarily given is whether an officer's actions are coercive. Id. (in Cannon, 29 F.3d 472, supra, the U.S. Supreme Court determined that consent was voluntary by considering factors such as no guns were drawn on the suspect, no force was used against the suspect, and handcuffs were not placed on the suspect).

To establish a lawful search based on consent, the State must demonstrate that consent was voluntary and not the result of duress or coercion. Burkholder, supra, 112 Nev. 535, 915 P.2d at 888 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 248, 93 S.Ct. 2041, 2058 (1973)). Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances, would feel free to decline a police officer's request or otherwise terminate the encounter. Id. (citation omitted). "'The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.'" Id. (citing Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988)).

"'[W]hile the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.'" Id. (citing Schneckloth, supra, 412 U.S. at 248-49, 93 S.Ct. at 2059).

In Burkholder, 112 Nev. 535, supra, the Nevada Supreme Court found that consent was voluntarily obtained by considering factors such as the officer did not touch the suspect, did not display his weapon, did not use a commanding tone in his questions, and did not threaten the suspect. The officer merely approached the suspect on the street, identified himself as a police officer, had a brief conversation with the suspect, and asked the suspect for consent to search.

See Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977; Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882 (1997).

The Traffic Stop Was Not Unreasonably Intrusive, Nor Unreasonably Lengthy.

NRS 171.123(4) provides as follows:

> A person must not be detained longer than is reasonably necessary to effect the purpose of this section, and in no event longer than 60 minutes. The detention must not extend

beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

Officers are permitted to detain persons suspected of criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). There are two prongs which must be considered when determining whether a proper Terry stop has occurred. First, courts must ask whether the officers' action was justified at its inception. See United States v. Toledo, 139 F.3d 913 (10th Cir. 1998) (citing Terry, supra, 392 U.S. at 20). Second, courts must ask whether the officers' actions during the detention were reasonably related in scope to the circumstances that justified the interference in the first place. Id.

An officer may expand a stop beyond its initial scope, however, if the suspect consents to further questioning, or if the detaining officer has "'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" Id. (citing United States v. Lambert, 46 F.3d 1064, 1069 (10th Cir. 1995)).

An officer is permitted to make a lawful traffic stop, and investigate reasonably suspected criminal activity, if the stop is neither unreasonably intrusive, nor unreasonably lengthy. See Gama, supra, 112 Nev. 833.

Even If The Search Of The Milk Shake Container Was Beyond the Scope Of Consent to Search The Vehicle, The Milk Shake Container Would Have Been Inevitably Discovered.

Evidence obtained, even though not pursuant to a warrant or exigent circumstance, will not be suppressed if the evidence would have been inevitably discovered. See Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984). Inevitable discovery can be proved upon a showing that the evidence would have been found in an inventory search that would inevitably follow seizure of a car. United States v. Kennedy, 61 F.3d 494, 498 (6th Cir. 1995); see also Clough v. State, 92 Nev. 603 (1976); Carlisle v. State, 98 Nev. 128 (1982).

CONCLUSION

For the aforementioned reasons, Defendants' Motion to Suppress should be denied in its entirety.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Search and Seizure Automobile Full Discussion

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendants.

_____/

OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, Washoe County District Attorney, and , Deputy District Attorney, and hereby files its Opposition to Defendant's Motion to Suppress; and Memorandum of Points and Authorities in support thereof. Said Opposition is made and based upon the following Points and Authorities, the exhibit(s) attached thereto and all pleadings and papers on file herein.

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF FACTS

ARGUMENT

The Stop Made By Officers Was Lawful And Proper Since They Had A Reasonable Suspicion, If Not Probable Cause, To Believe That Criminal Activity Was Afoot.

NRS 171.123(1) provides that "[a]ny peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime."

In Nevada, a pretextual traffic stop is of no consequence so long has a police officer has a valid reason to stop a vehicle. See Gama v. State, 112 Nev. 833, 920 P.2d 1010 (Nev. 1996). Even if officers have prior knowledge of drug activity, a pretextual stop under Nevada and federal law is permitted. Thus, a police officer may stop a vehicle based on articulable reasonable suspicion or probable cause, even if the police officer has an intent or motive to search a vehicle for contraband or evidence. Id.[2]

The Evidence Located By Officers Must Not Be Suppressed Since It Was Obtained Due To A Lawful Inventory Search.

It is well-established that police officers need not comply with the Fourth Amendment's probable cause and warrant requirements when they are conducting an inventory search of an automobile in order to further some legitimate caretaking function.[3] Weintraub v. State, 110 Nev. 287, 871 P.2d 339, 340

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[2] It is interesting that ROSS mentions Gama, supra, in a footnote in her Motion to Suppress when Gama, supra, is the controlling law in Nevada regarding reasonable suspicion or probable cause to stop a vehicle. ROSS, instead, cites Alejandre v. State, 111 Nev. 1253, 903 P.2d 805 (Nev. 1995), which was overruled in Gama, supra.

[3] The inventory search exception to the warrant requirement is premised on an individual's diminished expectation of privacy in an automobile and three important governmental interests in inventorying an automobile: to protect an owner's property while the automobile is in police custody, to ensure against claims of lost, stolen, or damaged property, and to guard the police from

(Nev. 1994) (citing South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976)). The inventory search must be carried out pursuant to standardized official department procedures and must be administered in good faith in order to pass constitutional muster. Id. (citing Colorado v. Bertine, 479 U.S. 367, 374, 107 S.Ct. 738, 742 (1987)).

The Supreme Court has held that a police officer must produce an actual inventory when she or he conducts an inventory search. Id. (citing State v. Greenwald, 109 Nev. 808, 858 P.2d 36 (Nev. 1993)); see also Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 1635 (1990).

In Wells, supra, 495 U.S., at 4, 110 S.Ct. 1635, the United States Supreme Court stated as follows:

> . . . an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory [citations omitted]. A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors.

In Greenwald, supra, the Supreme Court held that the inventory search of a motorcycle conducted by an officer was unlawful since it was too exacting of a search, including examining the contents of the gas and oil tanks, dismantling a flashlight, searching all the pockets of all the clothing found on the motorcycle and a complete internal inspection of the buckled saddlebags affixed to the motorcycle. Furthermore, the officer's inventory list failed to include many of the items located during the search; hence, the Supreme Court held that the inventory search was actually an unlawful search for evidence.

In Rice v. State, 113 Nev. 425, 936 P.2d 319 (Nev. 1997), the Supreme Court held that the inventory search of the defendant's backpack after he was arrested was unlawful. The officers in this

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> danger. United States v. Lomeli, 76 F.3d 146, 148 (7th Cir. 1996) . . . But the fact that an inventory search may also have had an investigatory motive does not invalidate it. Id.

case testified that they were looking for contraband when they searched the backpack. Furthermore, the record did not indicate that a formal inventory was prepared at the time of arrest.

Even If The Court Finds That The Inventory Search Was Not According to UNRPD Policy And Procedure, The Evidence Would Have Been Inevitably Discovered Due To The Necessity Of Conducting An Inventory Of The Mazda; Hence, The Evidence Must Not Be Suppressed.

The inevitable discovery exception applies when, at the time of the unlawful search, there was a separate independent line of investigation underway, or there are compelling facts indicating, that the disputed evidence would have inevitably been discovered, such as proof that the evidence would have been found in an inventory search that would inevitably follow seizure of a car. United States v. Kennedy, 61 F.3d 494, 498 (6th Cir. 1995). See also Clough v. State, 92 Nev. 603, 604-05, 555 P.2d 840, 841 (Nev. 1976); Carlisle v. State, 98 Nev. 128, 129-30, 642 P.2d 596, 597-98 (Nev. 1982).

The reason the Supreme Court in Greenwald, supra, and Rice, supra, found inventory searches to be improper is because facts were present indicating that officers were actually using the inventory search as a ruse for searching for evidence and contraband. Clearly, the Supreme Court disapproves of officers rummaging through a suspect's belongings through the guise of an inventory search.

The Evidence Located By Officers Must Not Be Suppressed Since It Was Obtained Due To A Lawful Search Incident To Arrest.

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification. New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864 (1981) (citing United States v. Robinson 414 U.S. 218, 235, 94 S.Ct. 467, 476 (1973)).

In Belton, supra, 453 U.S. 454, 101 S.Ct. 2860 (citing and quoting Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040 (1969)), the United States Supreme Court stated:

> "Articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'"

> The United States Supreme Court held that:
> When a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to arrest, search the passenger compartment of that automobile. Id. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so close will containers in it be within his reach. Id.

The Nevada Supreme Court has held, in order to search an automobile based on the "automobile exception" to the warrant requirement, a police officer must have probable cause to believe that criminal evidence is located inside an automobile, and must demonstrate exigent circumstances sufficient to dispense with the need for a warrant. State v. Harnisch, 113 Nev. 214, 931 P.2d 1359 (Nev. 1997); reh'g granted State v. Harnisch, 114 Nev. 225, 954 P.2d 1180 (Nev. 1998). See also Barrios-Lomeli, 113 Nev. 952, 944 P.2d 791 (Nev. 1997).

The case at hand, however, does not concern the "automobile exception," since at issue is whether officers seized the evidence incident to a lawful arrest. In Harnisch, supra, the Supreme Court did not find there to be a search incident to lawful arrest since such a search is limited to the passenger compartment of an automobile, and the evidence in that case was found inside the trunk.

In State v. Greenwald, 109 Nev. 808, 810, 858 P.2d 36, 37 (Nev. 1993), the Nevada Supreme Court stated "the authority to search incident to arrest derives from the need to disarm and prevent any evidence from being concealed or destroyed." Hence, the Supreme Court did not consider the prosecution's argument that a valid search incident to arrest occurred since the defendant "was locked away in a police car, and there was no conceivable 'need' to disarm him or prevent him from concealing or destroying evidence."[4]

The facts in the case at hand are starkly distinct from the facts in Greenwald, supra. In Greenwald, supra, the Supreme Court decided that the search of the motorcycle was not justified since the

[4] In Greenwald, supra, the defendant was stopped riding a motorcycle. After the officer locked the defendant inside a patrol vehicle, the officer proceeded to search every component of the motorcycle, including the saddlebag, gas and oil tanks and a flashlight. The Supreme Court also rejected the prosecution's argument that a valid inventory search was conducted.

defendant was locked up in the police vehicle, and the search was made some time after the defendant's arrest. However, it is clear that the Supreme Court based its decision on its disapproval of the officer's blatant search of the motorcycle without a reasonable justification. Significantly, a motorcycle does not contain a passenger compartment similar to an automobile. In fact, the search in Greenwald, supra, is more analogous to the search of a bag or backpack found on or near a suspect's person incident to arrest. See Rice v. State, 113 Nev. 425, 936 P.2d 319 (Nev. 1997).

In Rice, supra, 113 Nev. 425, 936 P.2d 319 (Nev. 1997), the Supreme Court found that a search incident to arrest of the defendant's backpack was improper. In Rice, supra, the defendant was arrested and his backpack was left outside of the police vehicle.

The facts in the case at hand are distinct from the facts in Rice, supra, insofar as Rice did not involve an automobile. The defendant in Rice was under arrest and had dropped his backpack. The police had not seen the defendant's hands inside the backpack, nor were there any other people with the defendant when he was arrested. The police could have taken the backpack to the police station, booked it in evidence, and conducted a routine inventory search of the backpack.[5] However, the officer testified that he searched the backpack for the purpose of finding additional contraband.

Greenwald, supra, and Rice, supra, did not deal with the search of an automobile incident to lawful arrest. Clearly, Belton, supra, 453 U.S. 454, 101 S.Ct. 2860, held that officers may search the inside of an automobile, and containers located therein, due to a lawful arrest. Hence, the precedent set forth by the United States Supreme Court in Belton, supra, applies to this case. Thus, the search of the bag was lawful, the evidence was lawfully obtained and ROSS' Motion to Suppress must be denied.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

---

[5] The Supreme Court seems to be sending a message to law enforcement that it will only acknowledge searches incident to a valid arrest that are justified, and not used merely to search property without a warrant.

By_____

Deputy District Attorney

Search Consent Third Party

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

With respect to the Defendant's argument, the State recognizes the constitutional rights of the Defendant under the constitutions of the United States of America and the State of Nevada. Further, the State understands that a violation of a person's constitutional rights may lead to a suppression of evidence. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed.2d 652 (1914); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1963).

In this case, the Defendant disputes the legality of the search of her residence by officers of the Reno Police Department. The State submits that the evidence will demonstrate that the Defendant consented to the search of her residence by the police. Both parties agree that consent is a recognized exception to constitutional warrant requirements.

The State understands that its burden is to prove by clear and persuasive evidence that the Defendant's consent to the search her residence was freely and voluntarily given. Howe v. State, 112 Nev. 458 (1996). Additionally, the State believes that the test to be used by the court in determining whether consent was freely and voluntarily given is a weighing of the "totality of the circumstances" of the encounter between the Defendant and the officers in which the consent was given. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The Defendant also asserts that should the court determine that the consent to search her residence was freely and voluntarily given then the officers exceeded the scope of her consent and/or that her consent was withdrawn before the controlled substances that are the subject of the motion were found by the police. The State understands that a consent giver can limit the consent in terms of area or extent of intrusion and can withdraw consent. The State respectfully submits that if the nature of the items searched for is disclosed by police and the consenting party does not expressly limit the area of the search, then the officers can search any part of the place consented to which a reasonable person would think could contain the object of the search. Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 296 (1991). The Jimeno court noted that "[t]he standard for measuring the scope of consent is that of objective

reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect." Jimeno at 251. The State submits that the evidence will show the officer's search did not exceed the scope of the Defendant's consent nor did Defendant withdraw her consent before the controlled substances were found.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____

Deputy District Attorney

Search Consent Third Party Apparent Authority

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

"The Fourth Amendment prohibits searches conducted without a warrant unless they fall within a few specifically established and well delineated exceptions. One such exception is a search conducted pursuant to proper consent voluntarily given." Snyder v. State, 103 Nev. 275, 738 P.2d 1303 (1987), citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974). This includes the "valid consent of a third party who possesses actual authority over or other sufficient relationship to the premises or effects sought to be inspected." State v. Taylor, 114 Nev. 1071, ___, 968 P.2d 315, 321 (1998), citing Matlock, supra.[6]

"Actual authority is proved (1) where defendant and a third party have mutual use of and joint access to or, control over the property at issue or (2) where defendant assumes the risk that the third party might consent to a search of the property." Taylor, supra, citing United States v. Kim, 105 F.3d 1579 (9th Cir.1997). See also, Matlock supra, 415 U.S. at 171 n.7, 94 S.Ct. at 993 n.7. Actual authority does not require an ownership interest in the property by the third party, and does not require the actual owner's presence. Taylor, supra, Nev. at ___, P.2d at 321.

Apparent authority is where the third party consenting to the search represents facts that would objectively warrant a police officer of reasonable caution to believe that the consenting party had authority over the property. Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793 (1990). The three part test is: "First, did the searching officer believe some untrue fact that was then used to assess the extent of the consent-giver's use of and access to or control over the area searched? Second, was it under the circumstances objectively reasonable to believe that the fact was true? Finally, assuming the truth of the

[6]"The rationale behind the Matlock rule is that a joint occupant assumes the risk of his co-occupant exposing their common private areas to such a search. There is no reasonable expectation of privacy to be protected under such circumstances." U.S. v. Morning, 64 F.3d 531 (9th Cir. 1995) citing U.S. v. Summerlin, 567 F.2d 684 (6th Cir. 1977), cert. denied, 435 U.S. 932, 98 S.Ct. 1507 (1978).

reasonably believed but untrue fact, would the consent-giver have had actual authority?" U.S. v. Dearing, 9 F.3d 1428, 1429-1430 (9th Cir. 1993). See also, Taylor, supra.

III. CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Search Consent and Scope

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

MULTIPLE THEORIES ARE PERMISSIBLE

The State is permitted to allege multiple theories of criminal conduct. The United States Supreme Court in Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 2499 (1991), held "if a state's courts have determined that certain statutory

alternatives are mere means of committing a single offense, rather than independent elements of a crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." As the instant motion correctly states, the Nevada Supreme Court decision recently in Labastida v. State, 112 Nev. 1502 (1996) held that, as a matter of law, child abuse and/or failure to prevent child abuse and/or failure to render medical treatment to said child is sufficient for a conviction of murder.

The Nevada Supreme Court has specifically adopted the logic of Schad in Evans v. State, 113 Nev. Ad. Op. 98 (August 28, 1997). There the court held "[W]e hold that the district court did not error in failing to separately instruct the jury on premeditated murder, a felony murder, and aiding and abetting murder, or to require unanimity on any one of the individual theories of culpability." Thus, the State is only required to put the defendant on notice as to the several different theories that it possesses in this case. It has done so in Count I of the Indictment, therefore, to answer the instant motion's question, the defense should be prepared to defend against all theories as alleged in Count I.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Search Incident to Arrest

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, Washoe County District Attorney, and , Deputy District Attorney, and hereby files its Opposition to Defendant's Motion to Suppress; and Memorandum of Points and Authorities in support thereof. Said Opposition is made and based upon the following Points and Authorities, the exhibit(s) attached thereto and all pleadings and papers on file herein.

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

II. ARGUMENT

The Evidence Located By Officers Must Not Be Suppressed Since It Was Obtained Due To A Lawful Inventory Search.

It is well-established that police officers need not comply with the Fourth Amendment's probable cause and warrant requirements when they are conducting an inventory search of an automobile in order to further some legitimate caretaking function.[7] Weintraub v. State, 110 Nev. 287, 871 P.2d 339, 340 (Nev. 1994) (citing South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976)). The inventory search must be carried out pursuant to standardized official department procedures and must be administered in good faith in order to pass constitutional muster. Id. (citing Colorado v. Bertine, 479 U.S. 367, 374, 107 S.Ct. 738, 742 (1987)).

The Supreme Court has held that a police officer must produce an actual inventory when she or he conducts an inventory search. Id. (citing State v. Greenwald, 109 Nev. 808, 858 P.2d 36 (Nev. 1993)); see also Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 1635 (1990).

In Wells, supra, 495 U.S., at 4, 110 S.Ct. 1635, the United States Supreme Court stated as follows:

> . . . an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory [citations omitted]. A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors.

In Greenwald, supra, the Supreme Court held that the inventory search of a motorcycle conducted by an officer was unlawful since it was too exacting of a search, including examining the

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[7] The inventory search exception to the warrant requirement is premised on an individual's diminished expectation of privacy in an automobile and three important governmental interests in inventorying an automobile: to protect an owner's property while the automobile is in police custody, to ensure against claims of lost, stolen, or damaged property, and to guard the police from danger. United States v. Lomeli, 76 F.3d 146, 148 (7th Cir. 1996) . . . But the fact that an inventory search may also have had an investigatory motive does not invalidate it. Id.

contents of the gas and oil tanks, dismantling a flashlight, searching all the pockets of all the clothing found on the motorcycle and a complete internal inspection of the buckled saddlebags affixed to the motorcycle. Furthermore, the officer's inventory list failed to include many of the items located during the search; hence, the Supreme Court held that the inventory search was actually an unlawful search for evidence.

In Rice v. State, 113 Nev. 425, 936 P.2d 319 (Nev. 1997), the Supreme Court held that the inventory search of the defendant's backpack after he was arrested was unlawful. The officers in this case testified that they were looking for contraband when they searched the backpack. Furthermore, the record did not indicate that a formal inventory was prepared at the time of arrest.

The Nevada Supreme Court has held, in order to search an automobile based on the "automobile exception" to the warrant requirement, a police officer must have probable cause to believe that criminal evidence is located inside an automobile, and must demonstrate exigent circumstances sufficient to dispense with the need for a warrant. State v. Harnisch, 113 Nev. 214, 931 P.2d 1359 (Nev. 1997); reh'g granted State v. Harnisch, 114 Nev. 225, 954 P.2d 1180 (Nev. 1998). See also Barrios-Lomeli, 113 Nev. 952, 944 P.2d 791 (Nev. 1997).

The case at hand, however, does not concern the "automobile exception," since at issue is whether officers seized the evidence incident to a lawful arrest. In Harnisch, supra, the Supreme Court did not find there to be a search incident to lawful arrest since such a search is limited to the passenger compartment of an automobile, and the evidence in that case was found inside the trunk.

In State v. Greenwald, 109 Nev. 808, 810, 858 P.2d 36, 37 (Nev. 1993), the Nevada Supreme Court stated "the authority to search incident to arrest derives from the need to disarm and prevent any evidence from being concealed or destroyed." Hence, the Supreme Court did not consider the prosecution's argument that a valid search incident to arrest occurred since the defendant "was locked away in a police car, and there was no conceivable 'need' to disarm him or prevent him from concealing or destroying evidence."[8]

[8] In Greenwald, supra, the defendant was stopped riding a motorcycle. After the officer locked the defendant inside a patrol vehicle, the officer proceeded to

The facts in the case at hand are starkly distinct from the facts in Greenwald, supra. In Greenwald, supra, the Supreme Court decided that the search of the motorcycle was not justified since the defendant was locked up in the police vehicle, and the search was made some time after the defendant's arrest. However, it is clear that the Supreme Court based its decision on its disapproval of the officer's blatant search of the motorcycle without a reasonable justification. Significantly, a motorcycle does not contain a passenger compartment similar to an automobile. In fact, the search in Greenwald, supra, is more analogous to the search of a bag or backpack found on or near a suspect's person incident to arrest. See Rice v. State, 113 Nev. 425, 936 P.2d 319 (Nev. 1997).

In Rice, supra, 113 Nev. 425, 936 P.2d 319 (Nev. 1997), the Supreme Court found that a search incident to arrest of the defendant's backpack was improper. In Rice, supra, the defendant was arrested and his backpack was left outside of the police vehicle.

Greenwald, supra, and Rice, supra, did not deal with the search of an automobile incident to lawful arrest. Clearly, Belton, supra, 453 U.S. 454, 101 S.Ct. 2860, held that officers may search the inside of an automobile, and containers located therein, due to a lawful arrest. Hence, the precedent set forth by the United States Supreme Court in Belton, supra, applies to this case. Thus, the search of the bag was lawful, the evidence was lawfully obtained and ROSS' Motion to Suppress must be denied.

CONCLUSION

Dated this _____ day of _____, 1999.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

---

search every component of the motorcycle, including the saddlebag, gas and oil tanks and a flashlight. The Supreme Court also rejected the prosecution's argument that a valid inventory search was conducted.

Search and Seizure Plain Feel Inevitable Discovery

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION TO

SUPPRESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and opposes defendant Singleton's Motion to Suppress filed , , . This Opposition is supported by the attached Points and Authorities, all papers on file in this case, and anticipated testimony at a suppression hearing.

DATED this ___ day of , .

RICHARD A GAMMICK
District Attorney
Washoe County, Nevada

By

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

OFFICER LAWFULLY DISCOVERED THE SAND'S GAMING CHIPS IN SINGLETON'S POCKET AND THE CHIPS AND SINGLETON'S SUBSEQUENT STATEMENT ARE ADMISSIBLE AT TRIAL.

The question to be answered on any Fourth Amendment issue is whether the search and seizure is unreasonable. The Fourth Amendment protects people against "unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case..." Cooper v. State of Cal., 386 U.S. 58, 59 (1967) (citations omitted). It is undisputed that a warrantless search is "per se unreasonable" under the Fourth Amendment, unless the surrounding facts show that the search falls within one of the "specifically established and well delineated exceptions" to the warrant requirement. Katz v. United States, 389 U.S. 347, 357 (1967).

A. The incriminating nature of the gaming chips seized from Singleton's pocket was readily apparent through the sense of touch.

In the recent case of Minnesota v. Dickerson, the United States Supreme Court recognized that non-threatening contraband detected through the sense of touch during a pat-search may be admitted into evidence as long as the search stayed within the limitations set forth by Terry. 508 U.S. 366, 373 (1993). The protective search authorized by Terry "must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'" Id. In recognizing this exception to the search warrant requirement based upon the sense of touch, the Supreme Court drew an analogy to the plain view doctrine and reasoned:

> We think that this [plain view] doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of

> the Fourth Amendment - or at least no search independent of the initial intrusion that gave the officers their vantage point. [citations omitted] The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment. [citations omitted] The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons: if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

Id., at pp. 375-76 (emphasis added).

An officer need not know that an item is contraband with absolute certainty, but instead must have probable cause to believe the item is contraband. In addressing a concern of the Minnesota Supreme court that the sense of touch is less immediate and less reliable than the sense of sight, Dickerson stated that "[r]egardless of whether the officer detects contraband by sight or by touch, the Fourth Amendment's requirement that the officer have probable cause to believe that an item is contraband before seizing it ensures against excessively speculative seizures." Id., at p. 376. In the context of the plain view doctrine, the Supreme Court has ruled that incriminating nature of contraband must be "immediately apparent" based on a probable cause standard. Texas v. Brown, 460 U.S. 730, 742 (1983). In reaching this conclusion, the Court cited a number of other cases and articulated:

> Plainly, the Court did not view the "immediately apparent" language...as establishing any requirement that a police officer "know" that certain items are contraband or evidence of a crime...[t]he seizure of property in plain view involves no invasion of privacy and *is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity*...We think this rule...requiring probable cause for seizure in the ordinary case, is consistent with the Fourth Amendment and we reaffirm it here...[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief"...that certain items

> may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Id., at pp. 741-42 (citations omitted).

In Texas v. Brown, a police officer stopped Brown in his car and asked him for his driver's license. Brown reached into his pants pocket and when he pulled his hand out, there was "an opaque, green party balloon, knotted about one half inch from the tip." Id., at p. 733. Based on his training and experience, the officer was familiar with the use of balloons as a common way to package narcotics. He seized the balloon and arrested Brown. The Court held that "it is plain that Officer Maples possessed probable cause to believe that the balloon in Brown's hand contained an illicit substance...The fact that Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents -- particularly to the trained eye of the officer." Id., at pp. 742-43.

Now, Dickerson found that under the facts and circumstances surrounding the recovery of a rock of cocaine weighing .20 gram from Dickerson's pocket, the officer's search exceeded the bounds of Terry. Id., at p. 378. Specifically, the Court found that the officer felt a lump in the defendant's pocket and concluded it was not a weapon, but did not determine that it was contraband until after he had examined it with his fingers by squeezing it, and feeling it slide in its cellophane wrapper inside the pocket. This manipulation with the officer's hands exceeded the permissible pat-search bounds of Terry since the manipulation was necessary to make the incriminating nature of the contraband immediately apparent. While Nevada and the Ninth Circuit have not yet analyzed the "plain feel" exception to the warrant requirement in any published opinions, several other state and federal courts have upheld such searches and seizures of drugs as well as other contraband. See, United States v. McCready, 878 F.Supp. 976, 980 (W.D. Tex. 1995), firearm in backpack that was not squeezed or manipulated; United States v. Ward, 23 F.3d 1303, 1306 (8th Cir. 1994), shotgun shells in pocket and firearm along Ward's side under jacket; State v. Collard, 951 P.2d 56,63 (Mont. 1997), ski goggles found on robbery suspect in the leg of his sweatpants; United States v. Hughes, 15 F.3d 798, 802 (8th Cir. 1994), small lumps in trouser pocket found to be rock

cocaine; United States v. Lang, 81 F.3d 955, 967 (10th Cir. 1996), bulge in pants pocket found to be rolled-up plastic bag of cocaine; United States v. Ashley, 37 F.3d 678, 681 (D.C. Cir. 1994), hard object under pants in groin area between upper thigh and pocket found to be bag of rock cocaine; United States v. Craft, 30 F.3d 1044, 1045 (8th Cir. 1994), bulges of hard, compact packages taped on ankles under pant legs found to be cocaine and heroin.

The officer's actions in Dickerson, can easily be distinguished from Officer Yawn's actions in this case. Without manipulation, Officer Yawn easily had probable cause to believe that Singleton had stolen Sands gaming chips in his pocket upon feeling the chips. The stolen gaming chips are different from any U.S. coin in their size, weight, and construction. Based on all the facts known to the officer at that time -- that the Sands Casino had been robbed by three black men the night before, that Seely, a caucasian male, was trying to cash some of the stolen chips and told police he got them from a friend waiting at Seely's home for Seely to cash the chips, and that Singleton was found waiting at Seely's home -- Officer Yawn certainly had probable cause to believe that the chips in Singleton's pocket were chips stolen from the Sands; in other words, their incriminating character was "immediately apparent." The fact that Officer Yawn couldn't actually see the Sands inscription on the chips through the fabric of Singleton's pocket prior to their removal is of no consequence just as there was no such problem with not being able to actually see the narcotics contained in the opaque green balloon in Brown, supra.

As set forth above, each Fourth Amendment issue is to be decided on its own set of facts and circumstances, and the question that must be resolved is whether the warrantless search and seizure was unreasonable. In the event that the court disagrees, other exceptions to the search warrant requirement also apply in this case.

B. Exigent Circumstances justified a warrantless seizure of the gaming chips in Singleton's pocket to prevent their loss or destruction.

Exigent circumstances may permit a warrantless search under "circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers and other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." Howe v. State, 112 Nev. 458, 466, 916 P.2d 153 (1996) (citations omitted). Private homes are extended the most

protection from warrantless searches and come under intense scrutiny. Id. Warrantless entry into a person's residence may be permitted when officers have probable cause to believe contraband is present. Id. The court should consider the following five factors "in determining whether the exigency of destruction of evidence exists:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating that the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic."

Id., at p. 467 (citations omitted).

The foregoing factors were set forth to analyze the search and seizure of evidence in a person's home. While Singleton's body is also afforded a high degree of privacy, warrantless intrusions into the human body, such as a blood test, are permitted if the State establishes probable cause and exigency. Schmerber v. California, 384 U.S. 757, 770-71 (1966); See, Cupp v. Murphy, 412 U.S. 291, 295-96 (1973.

Respectfully submitted this ___ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Search Voluntary Consent

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Court must assess three interrelated areas: 1) The nature of the initial contact; 2) the nature of the subsequent contact and 3) the circumstances surrounding Deputy Meyer's request of the defendant for consent to search.

A. INITIAL CONTACT

> Nevada law has categorized three types of contact between police and citizens, namely: (1) the 'consensual encounter,' which is completely voluntary and for which a police officer needs no justification; (2) the 'detention,' which is a seizure strictly limited in length, scope and purpose, and for which a police officer must have an articulable suspicion that the civilian has committed or will commit a crime; and (3) the 'arrest,' for which a police officer must have probable cause. Arterburn v. State, 111 Nev. 1121, at 1125, 901 P.2d 668 (1995) (citations omitted).

In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct., 3138, 82 L.Ed.2d 317 (1984), the U.S. Supreme Court observed that "...the usual traffic stop is more analogous to a so-called Terry[9] stop." Id., 104 S.Ct., at 3150. (Citations omitted). The Berkemer court held that: "The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that person temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda." Id. [Emphasis in original].[10]

B. SUBSEQUENT CONTACT:

"Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he was willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." Florida v. Royer, 460 U.S. 491 at 497, 103

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[9] Terry v. Ohio, 392 U.S. 1, 88 S.Ct., 1868, 20 L.Ed.2d 889 (1968).

[10] Nevada case law has defined "custody" to mean "a 'formal arrest or restraint on freedom of movement' of

S.Ct. 1319, 75 L.Ed.2d 229 (1983). Our State Supreme Court has held that mere police questioning does not constitute a "seizure" and law enforcement may "randomly without probable cause or a reasonable suspicion approach people in public places and ask for leave to search." State v. Burkholder, 112 Nev.Adv.Op. 74 at 3, 915 P.2d 886 (1996), citing Florida v. Bostick, 510 U.S. 429 at 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

C. CONSENT

Consent to a search or seizure is well-recognized exception to the warrant requirement; an objective test applies to evaluate the reasonableness of the search or seizure. Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). As applied to consent, "Voluntariness is a question of fact to be determined from all the circumstances..." Schneckloth v. Bustamonte, 412 U.S. 227, 93 S.Ct., 2041 at 2059, 36 L.Ed.2d 854 (1973). "Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances would fee free to decline a police officer's request or otherwise terminate the encounter.[11] Bostick, supra, 501 U.S. 429 at 434.

Our State Supreme Court has similarly held "to determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. The question in each case is whether the defendant's will was overborne when he confessed." Powell v. State, 113 Nev.Adv.Op. 6, 930 P.2d 1123 (1997), citing Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). See also, Silva v. State, 113 Nev.Adv.Op. 147, 951 P.2d 591 (1997); Burkholder, supra; Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994).[12]

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[11]This is the State's burden of proof. See Schneckloth, 93 S.Ct., at 2058.

[12]The State stipulates that defendant Jordan has a legitimate privacy interest in the vehicle and therefore standing. Otherwise, the defendant bears the burden of proof to establish his claim of a sufficient privacy interest. Rawlings v. Kentucky, 448 U.S. 98, at 104, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). See also, Rakas v. Illinois, 439 U.S. 123, 99 S.Ct., 421 at 433, 58 L.Ed.2d 387 (1978); United States v. Singleton, 987 F.2d 1444, 1447 (9th Cir. 1993).

The stop was made in a public place and not isolated from public view. Berkemer, supra, 104 S.Ct., at 3149. The intersection of Stead Boulevard and U.S. 395 is well-travelled road even at 2:00 a.m. In addition to the open view surroundings, the defendant was not alone. He did not face the two law enforcement personnel by himself; he was accompanied by his passenger.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Search Voluntary Consent II

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION TO SUPPRESS EVIDENCE

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, District Attorney of Washoe County and , Deputy District Attorney and hereby submits its opposition to defendant's motion to suppress evidence.

DATED this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney **POINTS AND AUTHORITIES**

I. STATEMENT OF FACTS

II. AUTHORITY AND ARGUMENT

As our court noted this year, "[A] waiver and consent, freely and intelligently given, converts a search and seizure which otherwise would be unlawful into a lawful search and seizure." State v. Plas, 80 Nev. 251, 254, 391 P.2d 867, 868 (1964). "[T]he voluntariness of [a] consent must be proved by the [s]tate by clear and convincing evidence." Lightford v. State, 90 Nev. 136, 139, 520 P.2d 955, 956 (1974). "[A] court must distinguish between the peaceful submission by the arrested suspect[13] to the authority of a law enforcement officer, from an intelligent and intentional waiver of a constitutional right." Thurlow v. State, 81 Nev. 510, 515, 406 P.2d 918, 921 (1965). "Whether in a particular case an apparent consent to search without a warrant was voluntarily given is a question of fact." Plas, 80 Nev. at 253, 391 P.2d at 868. State v. Johnson, 116 Nev.Adv.Op. 8, 993 P.2d 44 (2000). This is to be determined from the totality of the circumstances. Canada v. State, 104 Nev. 288, 290-91, 756 P.2d 552, 553 (1988).

In State v. Burkholder, 112 Nev. 535, 915 P.2d 886 (1996) our court adopted the Federal analysis of "voluntariness."[14] "Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances, would feel free to decline a police officer's request or otherwise terminate the encounter. See Bostick,[15] 501 U.S. at 434, 111 S.Ct. at 2386. "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988). Burkholder, Nev. at 539, P.2d at 888.

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[13] In our case here, the defendant was not arrested until long after consent had been given and a trafficking quantity of narcotics were found in his residence.

[14] Burkholder also held that law enforcement at random may approach persons without probable cause or even reasonable suspicion, to initiate a consent to search request. Id, Nev. at 538, P.2d at 888.

[15] Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

The Ninth Circuit has enumerated several specific factors to consider in determining voluntariness. Specifically, "(1) whether defendant was in custody; (2) whether the arresting officer had his gun drawn; (3) whether Miranda warnings had been given; (4) whether the defendant was told he has a right not to consent; and (5) whether the defendant was told that a search warrant could be obtained." U.S. v Torres-Sanchez, 83 F.3d 1123, 1129 (1996).

Here, the State contends that the defendant gave consent to search his residence to law enforcement during a consensual encounter, vitiating any need for a warrant. The defendant was not in custody at the time, was provided information relative to his constitutional rights and at no time did law enforcement use any coercive tactics to obtain the defendant's consent to search.

III. CONCLUSION

As such, the State requests that this court conduct a hearing to allow the State a second forum to reestablish the voluntariness of the defendant's consent that he gave to law enforcement that resulted in the discovery and seizure of a trafficking quantity of narcotics.

Dated this _____ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney
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By_____

Deputy District Attorney

Search Voluntariness of Defendant Consent

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

DEFENDANT'S CONSENT TO SEARCH

As noted in Burkholder, supra, "To establish a lawful search based on consent, the State must demonstrate that consent was voluntary and not the result of duress or coercion." Schneckloth v. Bustamonte, 412 U.S. 218, 248, 93 S.Ct. 2041, 2058, (1973). "Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances, would feel free to decline a police officer's request or otherwise terminate the encounter." See Bostick, 501 U.S. at 434, 111 S.Ct. at 2386. "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988). Burkholder, supra, Nev. at 539, P.2d at 888.[16] "The mere fact that the consent was given while appellant was in custody does not render it involuntary." Sparkman v. State, 95 Nev. 76, 590 P.2d 151 (1979), citing McIntosh v. State, 86 Nev. 133, 466 P.2d 656 (1970). Further, the mere fact that weapons were drawn at some point does not render an otherwise valid consent involuntary. Sparkman, supra, Nev. at 80,. P.2d at 154-155.[17]

Dated this _____ day of _____, .

RICHARD A. GAMMICK

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[16]For more treatment of the issue in Nevada courts, see also, Alejandre v. State, 111 Nev. 1235, 903 P.2d 794 (1995); Canada v. State, 104 Nev. 288, 290-91, 756 P.2d 552, 553 (1988).

[17]Sparkman cites approvingly of State v. Patterson, 571 P.2d 745 (Hawaii 1977) where a consent to search was upheld as voluntary where multiple officers with weapons "drew down" upon the consenting party who later disputed the voluntariness of a search.

District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Search Warrant Probable Cause

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

PROBABLE CAUSE FOR SEARCH WARRANT

Generally, there should be no suppression of evidence once an issuing judge executes a warrant if "The police were not dishonest or reckless in the preparation of their affidavits to support issuance of the warrant, and the facts supported an objective reasonable belief in the existence of probable cause." Barrett v. State, 105 Nev. 361, 775 P.2d 1276 (1989), citing Point v. State, 102 Nev. 143, 717 P.2d 38 (1986); United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984). It does however stand to reason that evidence illegally obtained should not be used to support a affiant declaration.[18]

III. CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

[18]In this event, the likely remedy would appear to be to strike the offending information used in support and if the balance of the declaration supports probable cause, the warrant stands.

Search Warrantless Third Party Consent

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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RICHARD A. GAMMICK
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Washoe County, Nevada
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Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Fourth Amendment protects people against "unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case..." Cooper v. State of Cal., 386 U.S. 58, 59 (1967). (citations omitted). It is undisputed that a warrantless search is "per se unreasonable" under the Fourth Amendment, unless the surrounding facts show that the search falls within one of the specifically established and well delineated exceptions" to the warrant requirement. Katz v. United States, 389 U.S. 347, 357 (1967).

Consent to search given by a someone other than the defendant is a valid exception to the warrant requirement where it "was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164, 171 (1974). "Actual authority is proved (1) where the defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property." State v. Taylor, 114 Nev.Adv.Op. 118 (November 25, 1998).

Even if a person does not have actual authority to consent to a search, the person may appear to officers to have authority. A search is valid if "the facts available to the officer at the moment... [would] 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises." Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (citations omitted). See, Taylor, supra. The Fourth Amendment does not demand "factual accuracy" from law enforcement officers, but instead only reasonableness in light of the situation confronting them. Rodriguez, supra, at pp. 185-187. Apparent authority consists of the following analysis:

> First, did the searching officer believe some untrue fact that was then used to assess the extent of the

> consent-giver's use of and access to or control over the area searched? Second, was it under the circumstances objectively reasonable to believe that the fact was true? Finally, assuming the truth of the reasonably believed but untrue fact, would the consent-giver have had actual authority?

Taylor, supra. Chapoose had actual authority over 580 Colonial and gave officers valid consent to search. Even if Chapoose did not have actual authority, he reasonably appeared to have authority.

> The United States Supreme Court has consistently held that:
> [T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action...This inquiry...normally embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy...The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable, whether...the individual's expectation, viewed objectively, is justifiable under the circumstances.

Smith v. Maryland, 442 U.S. 735, 740 (1978).

The Ninth Circuit followed this analysis when it ruled that trespassers or squatters have no reasonable expectation of privacy since they have no legal right to occupy property. Bishop v. Zimmerman, 25 F.3d 784, 787 (9th Cir. 1994). Zimmerman was a guest of squatters on private property. Agents of the property owner told the squatters they were trespassing and ordered them off the land. After being given an extension of time to leave, one of the squatters and Zimmerman remained on the land and were arrested for Trespassing. Zimmerman sued law enforcement and the property owner. The court found Zimmerman's arrest lawful and found no constitutional rights violations. Id., at p. 788. "There is no Fourth Amendment violation if the officers have obtained the consent of a third party who possesses common authority over the premises." (citations omitted.) "The police were provided with evidence of the [land owner's] ownership of the property at the time of the arrest. Moreover, even if the private defendants did not have actual authority over the premises, the arrest was valid because the police, at the time of the entry, reasonably believed they did have authority over the premises." Id.

An identified (as opposed to anonymous) "citizen informant", witness or victim of a crime is presumed reliable. United States v. Butler, 74 F.3d 916 (1996); See also, Illinois v. Gates, 462 U.S. 213 (1983).

A house guest can be contrasted from a trespasser in that a house guest has a legitimate and reasonable expectation of privacy in the host's home. Minnesota v. Olson, 495 U.S. 91, 98-99 (1990). However, that expectation of privacy is subject to the host's superior control over the property. Id. This concept has long been recognized in the Ninth Circuit. "Authority justifying a consent to search need only rest on mutual use of the property." United State v. Dubrofsky, 581 F.2d 208, 212 (9th Cir. 1978). A "permanent resident" of a house "who has a key to the premises and access throughout the residence can also give a valid consent to search." Id. This case involving a permanent resident can be distinguished from "hotel and apartment searches authorized by clerks and landlords" where an owner has relinquished "control over a section of the premises to a business tenant." Id.

In United States v. Novick, the court upheld a search of a room occupied by the defendant as a guest in his host's home. 450 F.2d 1111, 1113 (9th Cir. 1971). While a Novick was a guest, the host's wife attempted suicide. Novick was away from the house while police were at the house meeting with the host. The police asked if there were any weapons in the house that the host's wife could access, and the host advised them that he thought his guest had a firearm in his room. The host consented to the search of the guest's room and officers found an illegal machine gun in the room. The court distinguished this case that of a hotel guest because the host jointly occupied the premises.

"The joint user of property has the authority to consent...as does a lessee and resident of a house." United States v. Guzman, 852 F.2d 1117, 1121 (9th Cir. 1988). Guzman's wife leased an apartment for Guzman that she stayed at only on occasion. She had a key and gave officers consent to search the apartment. The court ruled that Guzman's motion to suppress was properly denied and reasoned that Guzman "produced no evidence that [his wife's] access to the apartment was limited, and identifies no other factor that might affect her right to consent, such as the presence of a person with a superior privacy interest who actively objects to the consent given." Id., at p. 1122 (emphasis added).

The court held that a "lessee and resident of [a] house...had authority to consent to a search of its contents." United States v. Salvador, 740 F.2d 752, 757 (1984). An armed robbery occurred in Arizona. The getaway car was described as a Cadillac with a black woman driving wearing a diamond ring and accompanied by a small child. The robber was described as wearing a green jogging suit. The

investigation led officers to a home with a Cadillac parked in the carport that matched the suspect car. They received information that three people matching the robbery report were inside the house. No one answered a knock at the door and a commotion inside could be heard. Officers entered and arrested the two suspects. The defendants explained that they were guests of their relatives who leased the residence. While officers secured the residence to obtain a warrant, the residents arrived home. Officers obtained consent to search from the lessee/resident of the house. In the bedroom where the defendants were staying, officers found and seized a purse with a loaded gun inside, cash from the robbery between the bed mattresses, a nylon stocking cap, and a green jogging suit. This search was upheld. Id., at p. 757. See also, Rubio v. United States, 727 F.2d 786, 796 (9th Cir. 1983).

Citing Novick, supra, the Second Circuit ruled that the lawful tenant of an apartment "clearly had authority to consent to a search of her premises, even though a "guest" was also present." United States v. Isom, 588 F.2d 858, 860 (2nd Cir. 1978). The tenant permitted the defendant to stay "at her apartment from time to time." Id. The tenant came home one day, found the defendant in the apartment, and noticed a bullet hole in the refrigerator. The two fought and the tenant left to call police. She advised police that the defendant was in her apartment and assaulted her. She further advised that he had guns and she wanted them removed. Officers went to the apartment and arrested the defendant. During the search they found one gun in a pillow case and four other guns in a metal strong box under the bed. In upholding the search, the court reasoned, "even if appellant had some right, doubtful at best, as a "licensee" to countermand Ames' consent to the search, Ames had undoubtedly revoked the "license" by asking the appellant to leave her apartment." Id., at p. 861.

See, Snyder v. State, 103 Nev. 275, 280-81 (1987)(officers reasonably relied on apparent authority of defendant's brothers to consent to search of defendant's apartment and evidence was admissible against defendant).

III. CO-TENANTS MAY GIVE VALID CONSENT TO SEARCH ALL AREAS THEY HAVE JOINT ACCESS TO, INCLUDING COMMON AREAS OF A DWELLING.

If the court were to reject the foregoing arguments, the court must still deny the defendants' Motions to suppress "all" evidence.

The Supreme Court has never "expressed the view that the Fourth Amendment protects a wrongdoer's belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa v. United States, 385 U.S. 293, 302 (1966). A consent search was upheld where a housemate gave officers consent to search the apartment she shared with the defendant. United States v. Kelley, 953 F.2d 562, 566 (9th Cir. 1992). Even though they had separate bedrooms, the housemate had access not only to the common areas of the apartment, but also to the defendant's bedroom to use the phone. This access authorized her consent to search the defendant's bedroom, including his closet. Id.

In United States v. Kim, the Ninth Circuit upheld a third party consent search of a storage unit. 105 F.3d 1579, 1582 (9th Cir. 1997). Kim had Wee rent the storage units for Kim, and had Wee lease them in his own name. As lessee, Wee could have had the storage company open the units for him. Wee retained the leases, and occasionally possessed the keys and supervised the unloading of shipments. Wee could have accessed the units at any time without Kim's knowledge or permission. Kim assumed the risk that Wee would "exceed to scope of his authorized access" and allow a search of the storage units. Id.

Colorado and other federal circuits have found that "where one co-occupant has victimized the other, the emergency nature and exigent circumstances provide an additional reason for validating a co-occupant's consent to a warrantless search..." People v. Sanders, 904 P.2d 1311, 1315 (1995) (citations omitted)

"If a person has voluntarily abandoned property, he has no standing to complain of its search and seizure." United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976), citing, Abel v. United States, 362 U.S. 217, 240-41 (1960). "Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective factors...Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." Id. (citations omitted). In deciding whether a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure, the court must look at "the totality of the circumstances, and two important factors are denial of ownership and physical relinquishment of the property." United States v. Nordling, 804 F.2d 1466, 1469 (9th Cir. 1986).

United States v. Robinson, 479 F.2d 300, 303 (7th Cir. 1973).

CONCLUSION

Search Warrantless Consent Standing

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION FOR

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this Opposition to the defendant's Motion. This Opposition is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Brooke Has No Standing To Challenge The Search Of A Rental Vehicle Of Which He Was Not In Lawful Possession Since He Had No Expectation Of Privacy.

Several United States Circuit Courts of Appeal have held that a person not named as an authorized driver of a rental vehicle, or who is not listed on the rental agreement, is without standing to challenge a search since that person is without a legitimate expectation of privacy in a vehicle which he or she does not lawfully possess. See United States v. Gama-Bastidas, 1998 WL 205239 (10th Cir. 1998); United States v. Wellons, 32 F.3d 117 (4th Cir. 1994); United States v. Riazco, 91 F.3d 752 (5th Cir. 1996); United States v. Fowler, 42 F.3d 1389 (6th Cir. 1994); United States v. Best, 135 F.3d 1223 (8th Cir. 1998); United States v. Ries, 43 F.3d 1484 (10th Cir. 1994); United States v. Cooper, 133 F.3d 1394 (11th Cir. 1998).

In Scott v. State, 110 Nev. 877, 877 P.2d 503, 507 (1994) (citing Rakas v. Illinois, 439 U.S. 128, 148, 99 S.Ct. 421, 432 (1978)), the Nevada Supreme Court recognized that "courts have found standing in cases where the non-owner driver or passenger can show lawful possession of a car."

In McKee v. State, 112 Nev. 642, 917 P.2d 940, 942 (1996) (citing United States v. Jefferson, 925 F.2d 1242 (10th Cir. 1991) (the court in Jefferson, supra, found that a non-owner driver lacked standing to challenge a search), the defendant was driving a vehicle while the owner was riding as a passenger. The Nevada Supreme Court found that the passenger/owner did not give up possession of the vehicle to the defendant; hence, it held that the defendant lacked a reasonable expectation of privacy in the vehicle and had no standing to challenge the search.

In the case at hand, Williams was the only authorized driver of the vehicle, and was the only person listed on the rental agreement. Further, Brooke was found driving the vehicle when he was not authorized to do so by the rental agency. Hence, Williams was without authority to give Brooke permission to drive and/or use the vehicle.

Neither Williams, nor Brooke, were authorized to take the vehicle outside of California. Hence, Brooke did not have lawful possession of the vehicle. Therefore, Brooke did not have a legitimate expectation of privacy in the vehicle, and Defendants' Motion to Suppress must be denied as it applies to Brooke.

Trooper Stop Was Lawful and Justified.

NRS 171.123 provides in pertinent part as follows:

> Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

In Gama v. State, 112 Nev. 833 (1996), the Nevada Supreme Court abolished the concept of pretexual traffic stops, and adopted the "could have" test. As long as an officer makes a lawful traffic stop that is neither unreasonably intrusive, nor unreasonably lengthy, he or she may effectuate a traffic stop for any other reason or purpose, i.e., searching for narcotics.

Trooper clocked the vehicle in question driving in excess of the posted speed limit. Driving in excess of the posted speed limit is a violation of NRS 484.361. Hence, Trooper made a lawful and justified stop.

A Warrant Was Not Necessary to Search The Vehicle Since Brooke and Williams Voluntarily Consented To The Search.

The United States Supreme Court has held that a search of a vehicle only requires probable cause to believe that evidence of a crime is present in a vehicle. See California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985). However, the Nevada Supreme Court adheres to the more stringent requirement that exigent circumstances must be present to justify a warrantless vehicle search. See Barrios-Lomeli, 944 P.2d 791 (1997) (citing State v. Harnisch, 113 Nev. 214, 222 (1997)).

Mere police questioning does not constitute a seizure. State v. Burkholder, 112 Nev. 535, 915 P.2d 886, 888 (1996)(citation omitted). The police may randomly -- without probable cause or a reasonable suspicion -- approach people in public places and ask for leave to search. Id.

In the case at hand, Trooper was within his lawful authority when he asked for consent to search the vehicle, and he did not need probable cause or a reasonable suspicion to do so.

For consent to be lawfully obtained, the State must demonstrate that it was voluntarily given. Voluntariness is a question of fact to be determined from the totality of the circumstances. United States v. Cannon, 29 F.3d 472, 477 (9th Cir. 1994) (citing Illinois v. Rodriguez, 497 U.S. 177, 183-89, 110 S.Ct. 2793, 2798-2802 (1990)). An important factor to consider when determination if consent is voluntarily given is whether an officer's actions are coercive. Id. (in Cannon, 29 F.3d 472, supra, the U.S. Supreme Court determined that consent was voluntary by considering factors such as no guns were drawn on the suspect, no force was used against the suspect, and handcuffs were not placed on the suspect).

To establish a lawful search based on consent, the State must demonstrate that consent was voluntary and not the result of duress or coercion. Burkholder, supra, 112 Nev. 535, 915 P.2d at 888 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 248, 93 S.Ct. 2041, 2058 (1973)). Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances, would feel free to decline a police officer's request or otherwise terminate the encounter. Id. (citation omitted). "'The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.'" Id. (citing Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988)).

"'[W]hile the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.'" Id. (citing Schneckloth, supra, 412 U.S. at 248-49, 93 S.Ct. at 2059).

In Burkholder, 112 Nev. 535, supra, the Nevada Supreme Court found that consent was voluntarily obtained by considering factors such as the officer did not touch the suspect, did not display his weapon, did not use a commanding tone in his questions, and did not threaten the suspect. The officer merely approached the suspect on the street, identified himself as a police officer, had a brief conversation with the suspect, and asked the suspect for consent to search.

Brooke and Williams were never ordered to exit the vehicle. Trooper asked Brooke and Williams to exit the vehicle which he is entitled to do while effectuating a traffic stop. See Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977; Maryland v. Wilson, 519 U.S. 408, 117 S.Ct.

882 (1997). Hence, Brooke and Williams were not restrained, nor were they in custody, when Trooper asked them to exit the vehicle and provide consent to search.

The Traffic Stop Was Not Unreasonably Intrusive, Nor Unreasonably Lengthy.

NRS 171.123(4) provides as follows:

> A person must not be detained longer than is reasonably necessary to effect the purpose of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

Officers are permitted to detain persons suspected of criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). There are two prongs which must be considered when determining whether a proper Terry stop has occurred. First, courts must ask whether the officers' action was justified at its inception. See United States v. Toledo, 139 F.3d 913 (10th Cir. 1998) (citing Terry, supra, 392 U.S. at 20). Second, courts must ask whether the officers' actions during the detention were reasonably related in scope to the circumstances that justified the interference in the first place. Id.

An officer may expand a stop beyond its initial scope, however, if the suspect consents to further questioning, or if the detaining officer has "'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" Id. (citing United States v. Lambert, 46 F.3d 1064, 1069 (10th Cir. 1995)).

An officer is permitted to make a lawful traffic stop, and investigate reasonably suspected criminal activity, if the stop is neither unreasonably intrusive, nor unreasonably lengthy. See Gama, supra, 112 Nev. 833.

NRS 171.123(4) provides that officers may detain individuals as long as is reasonable necessary, but in no case longer than 60 minutes.

The Search Of The Milk Shake Container Was Within The Scope Of Brooke's And William's Consent To Search The Vehicle.

As to the scope of a consensual search of an automobile, "'[t]he Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to

open a particular container within the automobile.'" United States v. Crompton, 65 F.3d 170 (7th Cir. 1995) (citing Florida v. Jimeno, 500 U.S. 248, 249 (1991)).[19]

Further, the scope of consent is generally defined by its expressed "'object'" -- what the officers are looking for. Id. (citing Jimeno, supra, 500 U.S. at 251).

In the case of a search for drugs, consent to search the vehicle would include consent to search containers within the vehicle which might contain drugs, with no additional consent required to search closed containers within the vehicle. Id. (citing Jimeno, supra, 500 U.S. at 251-52). However, the court noted the suspect could explicitly limit the scope of the consent. Id. (citing Jimeno, supra, 500 U.S. at 252). See also United States v. Kim, 27 F.3d 947 (3d Cir. 1994) (the court upheld a search of an automobile which included opening a sealed baby powder container).[20]

F. Even If The Search Of The Milk Shake Container Was Beyond the Scope Of Consent to Search The Vehicle, The Milk Shake Container Would Have Been Inevitably Discovered.

Evidence obtained, even though not pursuant to a warrant or exigent circumstance, will not be suppressed if the evidence would have been inevitably discovered. See Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984). Inevitable discovery can be proved upon a showing that the evidence would have been found in an inventory search that would inevitably follow seizure of a car. United States v. Kennedy, 61 F.3d 494, 498 (6th Cir. 1995); see also Clough v. State, 92 Nev. 603 (1976); Carlisle v. State, 98 Nev. 128 (1982).

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[19] In Crompton, supra, the officers lawfully searched the glove compartment, unlocked a floor compartment, opened a bag located in the floor compartment, and opened a cereal box which contained two packages of cocaine.

[20] In Kim, supra, the court found that opening the sealed baby powder container did not depend upon possession of a key, knowledge of a combination, or anything other than removing its lid. Further, the court found that opening the container did not render it useless. Id. The court stated the defendant "could have limited his consent to certain items, but he had the burden to express that limitation . . . which he did not." Id.

Pursuant to NHP policy, an inventory search is conducted to protect NHP from civil liability, and to ensure that arrested persons have record of their possessions. Thus, it is likely that the drugs which were found inside the milk shake container would have been inevitably discovered pursuant to a lawful inventory search.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Search Warrant Defendant's Burden to Upset

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

I. LEGAL STANDARDS

The basis of the Motion to Suppress is an alleged insufficient search warrant, due to dishonest or reckless information set forth by affiant of the Consolidated Narcotics Unit.

The defendant requests a hearing pursuant to Franks v. Delaware, 438 US 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), regarding the alleged reckless disregard by of certain aspects of the case.

A. Burden of proof

It is the defendant's burden to prove the search warrant is invalid.

This defendant is not entitled, nor is any defendant, to a hearing simply by demanding one, but must prove by affidavits or other proof that there is a substantial preliminary showing that there were intentional or reckless falsehoods in the affidavit supporting the warrant; a showing of ordinary negligence is not enough. Franks, supra.

The burden in a search warrant case is on the defendant by a preponderance of the evidence. U.S. v. Richardson, 943 F.2d 547 (5th Cir. 1991), and U.S. v. Wapnick, 60 F.3d 948 (2d Cir. 1995).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Search and Seizure Plain View

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* * *

THE STATE OF NEVADA,

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(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

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III. ARGUMENT

THE WARRANTLESS SEIZURE OF METHAMPHETAMINE FROM THE DEFENDANT'S TRUCK WAS REASONABLE UNDER THE CIRCUMSTANCES.

The Fourth Amendment protects people against "unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case..." Cooper v. State of Cal., 386 U.S. 58, 59 (1967). (citations omitted).

This case involves the search and seizure of an automobile. As a foundation to analyzing the facts of this case, it is important to review the case law that directs the application of the Fourth Amendment to automobiles. "Generally, less stringent warrant requirements have been applied to vehicles." Cardwell v. Lewis, 417 U.S. 583, 589-90 (1974).

> Besides the element of mobility, less rigorous warrant requirements govern [motor vehicles] because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office...Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements...The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel.

South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976).

It is undisputed that a warrantless search is "per se unreasonable" under the Fourth Amendment, unless the surrounding facts show that the search falls within one of the "specifically established and well delineated exceptions" to the warrant requirement. Katz v. United States, 389 U.S. 347, 357 (1967). A number of the exceptions to the warrant requirement apply in this case.

A. The methamphetamine in this case was located in "plain view" and was lawfully seized.

The methamphetamine in this case was in plain view between the passenger seats of the defendant's truck when detectives approached him in the K-Mart parking lot. The "plain view" doctrine is a well-recognized exception to the search warrant requirement. An officer may seize property without a warrant when (1) he is in a position where he has a legal right to be, (2) the item's incriminating character is immediately apparent, and (3) the officer has a lawful right of access to the object. Horton v. California. 496 U.S. 128, 137 (1990).

> The theory of [the plain view] doctrine consists of extending to nonpublic places such as the home, where searches and seizures without a warrant are presumptively unreasonable, the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband...And the practical justification for that extension is the desirability of sparing police, whose viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place, the inconvenience and the risk--to themselves or to preservation of the evidence--of going to obtain a warrant.

Arizona v. Hicks, 480 U.S. 321, 326-27 (1987).

1. Detective Hawkins spotted the methamphetamine inside the defendant's truck from a lawful vantage point without even conducting a search.

This case is similar to the circumstances set forth in Texas v. Brown, 460 U.S. 730, 744 (1983). In Brown, a seizure of suspected narcotics from a car was upheld after officers stopped the car at a driver's license checkpoint. Id. When the officer approached Brown and shined his flashlight into the car, Brown was pulling his hand out of his pocket and had a green knotted balloon caught between his fingers which he then dropped on the seat. Id., at p. 733. The officer suspected the balloon contained narcotics and shifted his position to see better into the glove box where he noticed other suspected drug paraphernalia. Id. Brown was ordered out of the car and the officer reached in and picked up the balloon. Id. The Court concluded that the officer was at a lawful vantage point when he observed narcotics and paraphernalia in Brown's car and reasoned:

> The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason [the officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy [citations omitted]

> shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled [the officer] to observe the interior of Brown's car and of his open glove compartment was not a search within the meaning of the Fourth Amendment.

Id., at p. 740. (emphasis added).

In determining whether or not the incriminating character of the narcotics in the defendant's car was immediately apparent, a belief supported by probable cause is all that is required. Id., at p. 742. The seizure of the knotted green opaque balloon was upheld in Brown as it was consistent with the packaging of narcotics even though the officer couldn't actually see the contents of the balloon. Id.

"A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984). In this case, the defendant's truck and the methamphetamine it contained were seized simultaneously when the defendant was placed under arrest.

"'Plain view' provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment." Brown, supra, at p. 738.

> The principle is grounded on the recognition that when a police officer has observed an object in "plain view," the owner's remaining interests in the object are merely those of possession and ownership...Likewise, it reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of the contraband, stolen property or incriminating evidence generally would be a "needless inconvenience,"...that might involve danger to the police and public...We have said previously that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on...Fourth Amendment interests against its promotion of legitimate governmental interests."...In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately...This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.

Id., at p. 739.

Just as the officer in Brown "viewed the green balloon in the interior of Brown's car and had probable cause to believe that it was subject to seizure under the Fourth Amendment," detectives in this case had authority to conduct a warrantless seizure of the methamphetamine in the defendant's truck. Id., at p. 744. "[R]esort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment." Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).

In balancing the intrusion on the defendant's Fourth Amendment interests against the promotion of legitimate government interests, it would be impractical and do nothing to promote the Fourth Amendment objective to protect the defendant from unreasonable searches and seizures by requiring CNU to obtain a warrant before seizing the drugs from his truck. The defendant and his truck were located in a public parking lot with the methamphetamine in open view to anyone passing by the truck. He had just invited Arnold into the truck and showed him the drugs. The defendant was ready to part with possession of these drugs as soon as Arnold paid him.

In comparing the facts before us to the facts in Brown, CNU was absolutely justified in seizing the defendant's narcotics. What little, if any, Fourth Amendment protections the defendant had in the interior of his truck was reasonably intruded upon by CNU. Aside from Brown, several other exceptions
to the warrant requirement allowed CNU detectives a lawful right of access to the narcotics inside the defendant's truck.

B. A warrantless search of an automobile is permissible pursuant to the automobile exception unless the vehicle is parked, immobile, and unoccupied.

In his motion, the defendant relies heavily upon the recent Nevada Supreme Court decisions of Barrios-Lomeli v. State, 113 Nev.Adv.Op. 106 (August 28, 1997) and State v. Harnisch, 113 Nev.Adv.Op. 23 (January 30, 1997) (hereinafter referred to as Harnisch I). In both of these cases, the defendants challenged the legality of the warrantless searches of their cars. The Court found that the State

failed to demonstrate exigent circumstances justifying the warrantless searches under the automobile exception.

In Harnisch I, Las Vegas authorities were investigating a kidnapping and robbery, and obtained a search warrant to look for evidence of the robbery at Harnisch's apartment (with no mention of an automobile). Id. While officers were executing the search warrant at his apartment, Harnisch arrived in his car and parked it in his designated parking place. Id. Harnisch was arrested and the search of his apartment continued. Id. After the search of Harnisch's apartment was completed, officers searched his car. Id. Incriminating information was found in the trunk. Id. Harnisch moved to suppress the evidence found in his trunk, and the State opposed it, claiming that the car was located within the curtilage of Harnisch's apartment. Id. The Court rejected this argument, and sua sponte, the Court analyzed other possible exceptions to the warrant requirement, holding that none applied. Id.

The Court held that the automobile exception did not apply because the State could not demonstrate "exigent circumstances sufficient to dispense with the need for a warrant." Id. In so holding, the Nevada Supreme Court mistakenly relied on Carroll v. United States, 267 U.S. 132, 153-54 (1925), even though the United States Supreme Court abandoned the exigency requirement in California v. Carney, 471 U.S. 386 (1985).

The Court revisited this issue seven months later in Barrios-Lomeli, supra. A confidential informant (CI) working with the Tri-Net Narcotics Task Force ("Tri-Net") set up a narcotics transaction with Barrios-Lomeli, who agreed to deliver methamphetamine to Carson City. Id. Barrios-Lomeli did not show up for the original delivery time, but later called and advised that bad weather kept him from travelling to Nevada. Id. Barrios-Lomeli called the CI the next day and advised that he would be in Carson City with the narcotics in a few hours. Id. Officers set up surveillance and saw a car and driver matching Barrios-Lomeli's description arrive at WalMart. Id. Barrios-Lomeli was with a woman and child and went inside to the McDonald's. Id. Officers contacted Barrios-Lomeli inside the store and asked him to come outside, where he was positively identified by the CI. Id. Barrios-Lomeli was pat-searched, but no drugs were found. Id. No contraband was visible in the car and officers searched the car without first obtaining Barrios-Lomeli's consent. Id. The narcotics were found behind the dash and removable stereo,

and Barrios-Lomeli was arrested. Id. The fact that there was no contraband in plain view was specifically noted by the Court. Id.

The Court held that officers must have exigent circumstances to conduct a warrantless search of a car, and that the State failed to make this showing. Id. The Court reasoned that although Barrios-Lomeli's companion could have left with the car, officers still had up to sixty minutes to detain the car and obtain a warrant, but did not even try. Id. Had they tried and were then unable to secure the warrant in that time frame, then an exigency would have arisen that would have allowed the officers to conduct a warrantless search. Id.

The Barrios-Lomeli decision is flawed in that while the Court acknowledged that Carney was the current status of federal law, the Court then relied on Harnisch I as support for the position that Nevada still requires a showing of exigency without considering the problem that Harnisch I relied on pre-Carney law. Since Barrios-Lomeli was decided in August, 1997, the Nevada Supreme Court has recognized its error and reconsidered its Harnisch I decision. State v. Harnisch, 114 Nev.Adv.Op. 28 (February 26, 1998) (hereinafter referred to as "Harnisch II"). [For the convenience of the court and counsel, please find a copy of Harnisch II attached hereto and marked as Exhibit "A"] In Harnisch II, the Court held that "the Nevada Constitution requires both probable cause and exigent circumstances in order to justify a warrantless search of a parked, immobile, and unoccupied vehicle." Id. (emphasis added). In rendering its decision, the Nevada Supreme Court relied on and quoted an Oregon Supreme Court case as persuasive authority:

> [A]ny search of an automobile that was parked, immobile and unoccupied at the time the police first encountered it in connection with the investigation of a crime must be authorized by a warrant issued by a magistrate or, alternatively, the prosecution must demonstrate that exigent circumstances other than the potential mobility of the automobile exist.

Id., citing State v. Kock, 725 P.2d 1285, 1287 (Or. 1986).

In light of Harnisch II, CNU detectives in this case were justified in searching the defendant's truck and seizing the narcotics for two reasons. First, in Harnisch II, officers arrested Harnisch

after he parked his car, but then continued to execute the search warrant for his apartment. This case differs from Harnisch II because the defendant's truck was the center of the investigation.

In addition to the truck being occupied and mobile when detectives initiated contact with the defendant, exigent circumstances existed which justified detectives' conduct of a warrantless seizure of the truck and narcotics. Examples of exigent circumstances offered by the Court in Harnisch II include potential destruction of evidence and concerns for the safety of the officers or the public. Id. In this case, the detectives were dealing with a truck that was registered to someone other than the defendant, so the potential for someone to come and attempt to take the truck (containing the methamphetamine) before officers secured a warrant certainly existed.

In Barrios-Lomeli, the Court rejected the exigency argument since officers did not even attempt to obtain a warrant. This point no longer seems critical to the analysis light of its absence from analysis in Harnisch II. However, on this point, the Court must not lose sight of two important Fourth Amendment principles. "First, the standard [set by this court] should be workable for application by rank and file, trained police officers." Illinois v. Andreas, 463 U.S. 765, 772 (1983). It should also "be reasonable." Id., at p. 773.

Based upon the mobile and occupied nature of the defendant's truck when officers initiated contact, as well as the exigencies existing due the presence of the methamphetamine in the truck in a public parking lot, officers acted reasonably and were justified in making a warrantless seizure of the truck and the methamphetamine it contained.

C. The methamphetamine seized in this case was the result of a lawful search incident to arrest of the passenger compartment of the defendant's truck and further justified by Nevada's forfeiture laws.

The defendant argues that there can be no valid search incident to arrest in this case because the defendant was in custody when the search occurred. Respectfully, the State disagrees. "When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a

contemporaneous incident of that arrest, search the passenger compartment of that automobile." New York v. Belton, 453 U.S. 454, 460 (1981).

The defendant cites Greenwald and Harnisch I as authority to show that a lawful search incident to arrest did not occur in this case. In Greenwald, the Court rejected the assertion of a warrantless search incident to arrest where the "search was made some time after the arrest and at a time that Greenwald was well secured in a police vehicle." State v. Greenwald, 109 Nev. 808, 809 (1993). (emphasis added). The Court reasoned that "the authority to search incident to arrest derives from the need to disarm and prevent any evidence from being concealed or destroyed." Id., at p. 810. There was no such conceivable need once Greenwald was "safely locked away in a police car." Id. Harnisch I reached the same result where Harnisch was arrested sometime before the search of his car and the incriminating evidence was found in the trunk (obviously beyond the passenger compartment limitation). Harnisch, 113 Nev.Adv.Op., supra.

Both Harnisch I and Greenwald can be easily distinguished from the facts of this case because of the gap in time between arrest and the search in those cases. In this case, the defendant was arrested upon Detective Hawkins looking in (without entering or searching) the defendant's truck and seeing the package of narcotics. As previously discussed under "Plain View," a search did not occur until Detective Hawkins opened the door of the truck to take a closer look. This occurred within seconds of Detective Hawkins ordering other officers to arrest the defendant and prior to the defendant being "safely locked away in a police car."

Once the defendant is placed under arrest, his truck containing the methamphetamine was seized and removed from the front parking lot area. Not only was such conduct justified by the need to prevent the destruction of evidence consistent with Greenwald and Harnisch I, but also the warrantless seizure of the narcotics and truck were consistent with Nevada's forfeiture statutes:

> The following are subject to forfeiture pursuant to NRS 179.1156 to 179.119, inclusive:
>
> 1. All **controlled substances** which have been manufactured, distributed, dispensed with or acquired in violation of the provisions of NRS 453.011 to 453.552, inclusive...
>
> 5. All conveyances, including aircraft, **vehicles** or vessels, which are used, or intended for use, to transport, or in any manner to

> facilitate the transportation, concealment, manufacture or protection, for the purpose of
>
> sale, possession for sale or receipt of property described in subsection 1 or 2.

NRS 453.301(1)-(5). (emphasis added).

> A seizure of property may be made by a law enforcement agency without process if:
> (a) The seizure is incident to: (1) an arrest...or
> (d) The law enforcement agency has probable cause to believe that the property is subject to forfeiture.

NRS 179.1165(2).

The United States Supreme Court upheld the warrantless search of a car seized pursuant to state forfeiture laws where officers seized Cooper's car after he sold narcotics to an informant and was arrested. Cooper v. State of Cal., 386 U.S. 58, 61-62 (1967). Evidence used at trial was found in the glove box about one week after the car was seized and stored in a garage. Id., at pp. 58-59. The Court reasoned:

> Their subsequent search of the car--whether the State had "legal title" to it or not--was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right even for their own protection, to search it...we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

D. The narcotics seized in this case were ultimately removed from the defendant's truck during a valid inventory search.

CNU detectives drove the defendant's truck from K-Mart to the CNU garage where it was stored until its release to Albert Martinez a few weeks later. Upon arrival, the contents of the truck were inventoried and the evidentiary items were removed. See, Exhibit "B" marked and attached hereto. Conducting a vehicle inventory search furthers a legitimate governmental caretaking function and, therefore, the Fourth Amendment's probable cause and warrant requirements do not apply. South Dakota v. Opperman, 428 U.S. 364 (1976). The inventory search must be carried out pursuant to a standardized

official department procedure and must be administered in good faith to pass constitutional muster. Colorado v. Bertine, 479 U.S. 367, 374 (1987). A police officer must produce an actual inventory when he conducts an inventory search. State v. Greenwald, 109 Nev. 808, 811 (1993). Even though the officer in Greenwald performed a painstaking search of the Greenwald's motorcycle and came across numerous items, he listed only four items on his inventory sheets. Id., at p. 810. The Court found an invalid inventory search since the trooper "did not even pretend to prepare a complete inventory of all of the items" that he discovered during his search. Id. at p. 811.

The Washoe County Sheriff's Department General Order 275.214 states the general policy for a routine inventory:

> 1. As a community caretaking function, a routine inventory shall be conducted of the contents of all vehicles impounded or stored for safekeeping, provided that such an inventory will not damage or destroy any evidence. The inventory shall be conducted as soon as possible, and before the vehicle is turned over to the tow truck operator, unless it is impractical to do so. In this case, the inventory shall be conducted immediately upon the arrival of the vehicle at its place of safekeeping.
>
> 2. The scope of the inventory shall extend to all areas within the vehicle where personal property is ordinarily stored so long as access can be gained without forcible entry. These areas include the glove compartment, trunk, and other containers, whether unlocked or locked if they can be opened with a key.
>
> 3. The inventory must be recorded on the VEHICLE AND RELEASE REPORT (S-278). If additional space is needed, the SUPPLEMENT OR CONTINUATION REPORT (S-143) shall be used.

See, Exhibit "C" marked and attached hereto. General Order 275.215 further directs that "[c]ontraband, instruments of a crime, and evidence [discovered during an inventory] shall be processed and placed in the evidence room in accordance with established procedure." See, Exhibit "C".

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____

Deputy District Attorney

Secret Offense Statute of Limitations

CODE
Richard A. Gammick
#001510
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Defendant's motion fails to cite the controlling statutory law. NRS 171.095 provides that:

> 1. Except as otherwise provided in subsection 2 and NRS 171.083:
>
> (a) If a felony, gross misdemeanor, or misdemeanor is committed in a secret manner, an indictment for the offense must be found, or an information or complaint filed, within the period of limitation prescribed in NRS 171.085 and 171.090 **after the discovery of the offense** unless a longer period is allowed by paragraph (b).
>
> (b) An indictment must be found, or an information or complaint filed, **for any offense constituting sexual abuse of a child, as defined in NRS 432B.100, before the victim of the sexual abuse is:**
>
> **(1) twenty-one years old if he discovers or reasonably should have discovered that he was a victim of the sexual abuse by the date on which he reaches that age**; or
>
> (2) twenty-eight years old if he does not discover and reasonably should not have discovered that he was the victim of the sexual abuse by the date on which he reaches twenty-one years of age.

The Nevada Legislature adopted the statute in direct response to the reality that children often wait years to tell the authorities that they have been sexually abused. The Nevada Supreme Court has expressly recognized this reality. See Walstrom v. State, 104 Nev. 51 (1988), at pp. 55-56, and footnote 8 thereto. The Nevada Legislature did not attempt to further define what the terms of "secret manner" and "discovery" mean, leaving it to the trial court to determine as a question of fact. The applicable Nevada cases make clear that an offense may be committed in a secret manner when it is committed in private by an adult defendant upon a child with no other witnesses present. Indeed, most of the cases where the Supreme Court has found that an offense was committed in a secret manner involve lewd acts committed by adult defendants on child victims, as in the present case. See e.g., Walstrom v. State, 104 Nev. 51 (1988); Hubbard v. State, 110 Nev. 671 (1994); Houtz v. State, 111 Nev. 457 (1995).

Thus, the initiation of the prosecution was clearly timely pursuant to NRS 171.095(1)(a).

The timeliness of the initiation of the prosecution is even clearer pursuant to NRS 171.095(1)(b), quoted in full supra. Under that section a complaint for any offense constituting sexual abuse of a child, as defined in NRS 432B.100, can be filed at any time until the victim reaches twenty-one years of age, **even if the offense was not committed in secret.** NRS 432B.100 includes lewdness with a child under the age of fourteen years and under the definition of "sexual abuse." Therefore, as to the lewdness counts (I & II) the initiation of the instant prosecution is clearly timely under NRS 171.095(1)(b).

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Seize Blood Motion

CODE
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#001510
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TO SEIZE BLOOD SAMPLE OF DEFENDANT

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The withdrawal of a blood sample is subject to Fourth Amendment requirements and, therefore, a Search Warrant must be procured before a suspect may be required to submit to such a procedure unless exigent circumstances exist that would justify a warrantless search. Schmerber v. California, 384 U.S. 757 (1966). The State in no way suggests that exigent circumstances exist in the instant case to permit a search or seizure without judicial approval. However, probable cause clearly establishes probable cause and the need to seize a sample of the defendant's blood for evidentiary and comparison purposes. Although the defendant has previously provided three samples of blood on the date of the offense pursuant to NRS 484.383, said samples are deemed of little if any value if not taken and tested within a three month period.

CONCLUSION

It is hereby respectfully requested that be ordered to submit a sample of his blood for all evidentiary, analysis, and comparison purposes in the pending criminal investigation.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

ORDER

IT IS HEREBY ORDERED, and the State is hereby directed, to seize a sample of blood from for all evidentiary, analysis and comparison purposes in the pending criminal investigation.

IT IS FURTHER ORDERED that medical or duly qualified personnel are to be employed to obtain the samples and if there is any resistance, they are directed to use reasonable force to exact this Order.

This Order may be served between the hours of 7:00 a.m., and 7:00 p.m.

DATED this _____ day of _____, .

_____
DISTRICT JUDGE

Self Defense Character Victim

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Evidence of the victim's character is inadmissible in a homicide case unless: (1) Where character or a trait of character of a person in an essential element of a charge, claim or defense; and (2) where the character of the victim relates to the reasonableness of force used by the accused in self defense. State v. Sattler, 956 P.2d 54, (Mont. 1998); State v. Arrasmith, 1998 WL 151494 (Idaho App. 1998).

The Nevada Supreme Court in addressing character evidence pursuant to the statutory provisions of NRS 48.045 stated:

> [B]efore any evidence is admissible, it must be relevant. NRS 48.025(2). Character evidence is no exception.

Coombs v. State, 91 Nev. 489, 538 P.2d 162 (1975).

See also Libby v. State, 109 Nev. 905, 915, 859 P.2d 1051, 1057 (1993) (evidence of a victim's character or trait of character is not admissible unless specifically brought into issue). In Coombs the court addressed the defense attempt to proffer a self-defense case and sought to admit evidence of the victim's violent character.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. Further, determinations of relevancy are within the discretion of the trial court. Brown v. State, 107 Nev. 27 (1991).

Further, there is a requirement that even if a showing of relevance can be made, this court must determine whether the probative value outweighs the prejudicial effect of such evidence. People of Territory of Guam v. Ted Taotao, 896 F.2d 371 (9th Cir. 1990); State v. Vierra, 872 P.2d 728 (Idaho App. 1994).

Therefore, the State specifically requests to this Court an Order prohibiting the defense from offering any evidence of the victim's character without a prior showing of the relevance of that testimony and that the probative value outweighs any prejudicial effect outside the presence of the jury.

Such a procedure will ensure that only relevant evidence is admitted and that no attempt is made to improperly taint the victim's character in front of the jury in this case.

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Self Representation

CODE 3880
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO "COURT-ORDERED MOTION FOR SELF REPRESENTATION"

POINTS AND AUTHORITIES

Recently, the Nevada Supreme Court has addressed the issue of self-representation. "A criminal defendant has an 'unqualified right' to represent himself at trial so long as his waiver of counsel is intelligent and voluntary." [Citations omitted]. In assessing a waiver, the question before the District Court is not whether the defendant can competently represent himself, but whether he can knowingly and voluntarily waive his right to counsel. '[T]he defendant's technical knowledge is not the relevant inquiry. In order for a defendant's waiver of right to counsel to withstand constitutional scrutiny, the Judge need only be convinced that the defendant made his decision with a clear comprehension of the intended risks.' Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996) (citing *Feretta*, 422 U.S. at 835-36, 95 S.Ct. at 2541-42). Furthermore, 'a request for self-representation may *not* be denied solely because the Court considers this defendant to lack reasonable *legal* skills or because of the inherent inconvenience often

caused by *pro se* litigants.' Lyons, 106 Nev. at 444, Note 1, 796 P.2d at 217, Note 1. Tanksley v. State, 113 Nev. 997, 946 P.2d 148 (1997).

The Tanksley court also indicated that a defendant's request for self-representation may properly be denied under the following circumstances:

1) The request is untimely;

2) The request is equivocal;

3) The request is made solely for the purpose of delay;

4) The defendant abuses his right by disrupting the judicial process; or

5) The defendant is incompetent to waive his right to counsel.

The State is significantly concerned with items 1, 3 and 4 cited above. While the instant Motion indicates that he is prepared to represent himself at the trial date as currently set, to wit, September 7, 1999, a sufficient canvass of that fact should undoubtedly be done prior to the defendant's right to self-representation being adopted by this Court.

In Tanksley, the District Court had denied the defendant's request to self-representation because he was disruptive. A thorough canvass of the defendant's understanding and willingness to abide by the rules of courtroom procedure is essential to satisfy this aspect of the Tanksley analysis. "In determining disruption, the defendant's pretrial activity is relevant 'if it affords a strong indication that the defendants will disrupt the proceedings in the courtroom.'"

A proper canvass and waiver of the right to counsel was found in Harris v. State, 113 Nev. 799, 942 P.2d 151 (1997). While the Court indicated that Supreme Court Rule 253 was not in effect at the time of the Harris case, the trial court properly conducted the hearing to determine a knowing and intelligent waiver of right to counsel. As this Court is undoubtedly aware, Supreme Court Rule 253 set forth guidelines and procedures in criminal cases where a defendant is attempting to elect to represent himself. The rule requires the trial court to make a specific, penetrating and comprehensive inquiry of the defendant to determine whether the defendant understands the consequences of his or her decision to proceed without counsel. Further, the District Courts should make specific findings of the observations of the defendant, as the Court perceives it, and whether those observations coincide with their ability to

understand the nature of the proceedings and that the request is one born of free will. While this is not an exhaustive list of the guidelines and procedures, a complete copy of Supreme Court Rule 253 is attached hereto as Exhibit I.

RIGHT TO SELF-REPRESENTATION

The State is cognizant of the defendant's right to self-representation, however, that right is not absolute. Supreme Court Rule 253 and Tanksley v. State set forth rather concrete guidelines for a trial court to assess prior to granting the defendant's Motion for self-representation. The State's ultimate opinion/position relative to the instant Motion is reserved pending the results of the aforementioned inquire and assessment by this Court.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Self Representation II

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

JOHN EDWARD HAMILTON,

Defendant.

_____/

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, and , Deputy District Attorney, and files this (hereinafter, "Motion"). This Motion is pursuant to Wheby v. State, 95 Nev. 567 (1979)(*overruled on other grounds*, Keys v. State, 104 Nev. 736 (1988)), the attached POINTS AND AUTHORITIES attached hereto and incorporated herein by this reference, and any oral argument deemed necessary by the Court.

Dated this _____ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By:_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

The Nevada Supreme Court has held that a defendant is not entitled to a "hybrid representation" in which he represents himself and has the assistance of counsel. In Wheby v. State, 95 Nev. 567 (1979)(*overruled on other grounds*, Keys v. State, 104 Nev. 736 (1988)) the Court states:

> We have previously determined that although a criminal defendant may have both the right of self representation and a right to assistance of counsel, this does not mean that a defendant is entitled to have his case presented in court both by himself and by counsel acting at the same time or alternatively at the defendant's pleasure. Miller v. State, 86 Nev. 503, 506, 471 P.2d 213 (1970). *Accord*, Layton v. State, 91 Nev. 363, 536 P.2d 85 (1975). We find nothing in Faretta which would require us to alter our analysis of the issue, and we note that in so concluding we are in accord with the federal courts which have considered the question of "hybrid representation" in light of Faretta (citations omitted).

Wheby 95 Nev. at 568-69.

Dated this _____ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Sentence Correct Amend Modify Illegal NRS 176.555

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION TO AMEND, CORRECT

AND OR MODIFY A SENTENCE IN AN ILLEGAL MANNER

PURSUANT TO NRS 176.555

COMES NOW, the State of Nevada, by and through counsel, RICHARD A GAMMICK, Washoe County District Attorney, and

, Deputy District Attorney, and hereby submits this Opposition To Motion To Amend, Correct and/or Modify A Sentence In An Illegal Manner Pursuant To NRS 176.555. This Opposition is supported by these Statements of the Case and Law, any papers and pleadings filed herein, and any argument or evidence which may be presented at a hearing on this matter.

STATEMENT OF THE CASE
FACTS
STATEMENT OF LAW
ARGUMENT

The defendant now requests that this Court correct what he calls an illegal sentence.

NRS 176.555 provides that: "The court may correct an illegal sentence at any time." NRS 176.555.

Motions to correct illegal sentences address only the facial legality of a sentence. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). In Edwards, the Court defined the term "illegal sentence":

> "An "illegal sentence" for purposes of a statute identical to NRS 176.555 was defined by the District of Columbia Court of Appeals as "one 'at variance with the controlling sentencing statute,' or "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided...." Allen v. United States, 495 A.2d 1145, 1149 (D.C.1985) (quoting Prince v. United States, 432 A.2d 720, 721 (D.C.1981) and Robinson v. United States, 454 A.2d 810, 813 (D.C.1982)).

Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

Such is not the case here. The defendant was sentenced to 15 years in prison pursuant to NRS 453.3385 as it read at the time of his conviction. (See a copy of NRS 453.3385 (1993) attached hereto as Exhibit A.) NRS 193.130, in 1994, provided that:

> Every person convicted of a felony:
> 1. For which a term of imprisonment is provided by statute, shall be sentenced to a definite term of imprisonment which shall be within the limits prescribed by the applicable statute, unless the statute in force at the time of commission of such felony prescribed a different penalty.

NRS 193.130 (1993). (See Exhibit B.) The defendant's sentence, both originally and as later modified, was a definite term of imprisonment within the limits prescribed by the applicable statute.

The defendant's sentence was not illegal as that term is defined. Accordingly, the State of Nevada respectfully requests that the defendant's request be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Sentence Illegal Contesting Sufficiency of Evidence by Motion

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE DEFENDANT CANNOT CONTEST THE SUFFICIENCY OF THE EVIDENCE UTILIZING A MOTION FOR ILLEGAL SENTENCE

An "illegal sentence" for purposes of a statute identical to NRS 176.555 was defined by the District of Columbia Court of Appeals as "one 'at variance with the controlling sentencing statute,' or "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided...." Allen v. United States, 495 A.2d 1145, 1149 (D.C.1985) (quoting Prince v. United States, 432 A.2d 720, 721 (D.C.1981) and Robinson v. United States, 454 A.2d 810, 813 (D.C.1982)). A motion to correct an illegal sentence "presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence." Id. A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot, however, be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing. Issues concerning the validity of a conviction or sentence, except as detailed in this opinion, must be raised in habeas proceedings. NRS 34.724(2)(b); see State v. Meier, 440 N.W.2d 700, 703 (N.D.1989)

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Sentence Post Conviction Relief Amend or Modify

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION FOR CORRECTION OF ILLEGAL SENTENCE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, and ELLIOTT A. SATTLER, II, Deputy District Attorney, and hereby files this OPPOSITION TO MOTION FOR CORRECTION OF ILLEGAL SENTENCE (hereinafter, "Opposition"). The Opposition is pursuant to NRS 176.555, NRS 34.720 through 34.738, Edwards v. State, 112 Nev. 704 (1996), Staude v. State, 112 Nev. 1 (1996), Passanisi v. State, 108 Nev. 318 (1992), Staley v. State, 106 Nev. 75 (1990), Hardison v. State, 84 Nev. 125 (1968), Hollander v. State, 82 Nev. 345 (1966), Lisby v. State, 82 Nev. 183 (1966), the transcripts, pleadings, papers, and authorities already on file with this Court related to all proceedings in this matter, the dismissal of the petitioner (hereinafter, "petitioner") appeal of his conviction to the Nevada Supreme Court, the attached POINTS AND AUTHORITIES incorporated herein by this reference, and any oral argument the Court desires.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

Sentence Modify Mistake of Fact or Criminal Record

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE DEFENDANT'S POSITION ON THE LEGALITY OF THE STATUTE

MUST BE RAISED IN HABEAS PROCEEDINGS.

The Nevada Supreme Court has clearly stated in Edwards v. State (1996) 112 Nev. 704, that issues with a defect in the statute must be raised in a writ of habeas corpus.

> Issues concerning the validity of a conviction or sentence, except as detailed in this opinion must be raised in habeas proceedings. Id.

This court has expressly recognized two types of post-conviction challenges to judgments of conviction that are "incident to the proceedings in the trial court," and thus are excepted by NRS 34.724(2)(a) from the provisions of the habeas statutes: A motion to modify a sentence based on very narrow due process grounds, and a motion to correct a facially illegal sentence. Passanisi v. State, 108 Nev. 318, 831 P.2d 1371 (1992). In all other cases, post-conviction challenges to "the validity of [a] conviction or sentence" must be brought pursuant to NRS 34.720 through NRS 34.830. See NRS 34.724(2)(b).

> NRS 34.724 states:
> 1. Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the constitution or laws of this state, or who claims that the time he has served pursuant to the judgment of conviction has been improperly computed, may, without paying a filing fee, file a post-conviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence or to challenge the computation of time that he has served.
>
> 2. Such a petition:
> (b) Comprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging

> the validity of the conviction or sentence, and must be used exclusively in place of them. (emphasis added)

The defendant filed his motion on the illegality of the sentence claiming double jeopardy and an illegal statute. These types of motions must be raised in habeas proceedings pursuant to Nevada law. The defendant cannot use a motion to correct an illegal sentence in place of a habeas corpus proceeding. A defect existing in a complaint or information must be raised in a petition for a writ of habeas corpus. Giese v. Chief of Police (1971) 87 Nev. 522 citing Ex Parte Dickson (1913) 36 Nev. 94.

THIS COURT ONLY HAS JURISDICTION TO CORRECT A SENTENCE
WHERE THESE IS A MISTAKE OF FACT OR A MISTAKE IN
DEFENDANT'S CRIMINAL HISTORY

> In Passanisi v. State, 108 Nev. 318, 831 P.2d 1371 (1992) the court stated:
> "Generally, a district court lacks jurisdiction to suspend or modify a sentence after the defendant has begun to serve it. See NRS 176.1853(2); Miller v. Hayes, 95 Nev. 927, 604 P.2d 117 (1979). We have made exceptions to this rule, however, when a court has made "a mistake in rendering a judgment which works to the extreme detriment of the defendant." State v. District Court, 100 Nev. 90, 95, 677 P.2d 1044, 1047 (1984) (quoting Warden v. Peters, 83 Nev. 298, 301, 429 P.2d 549, 551 (1967)) [108 Nev. 323] (emphasis in original). Nevertheless, "not every mistake or error which occurs during sentencing gives rise to a due process violation. The cases implicitly recognize [that] ... a due process violation arises only when the errors result in 'materially untrue' assumptions about a defendant's record .... [T]hese considerations
>
> represent an appropriate jurisdictional limit to the correction or modification of a defective sentence by a district court." State v. District Court, 100 Nev. at 97, 677 P.2d at 1048-49 (quoting Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948)) (emphasis added); see also Staley v. State, 106 Nev. 75, 79, 787 P.2d 396, 398 (1990).
>
> Thus, it is clear that the district court had jurisdiction to modify appellant's sentence in this case only if (1) the district court actually sentenced appellant based on a materially false assumption of fact that worked to appellant's extreme detriment, and (2) the particular mistake at issue was of the type that would rise to the level of a violation of due process.

> In a footnote in Passanisi v. State, 108 Nev. 318, 831 P.2d 1371 (1992), the Court states:
> "[t]he narrow type of challenge which may be brought pursuant to the inherent authority of the district court recognized in Peters, State v. District Court and Staley, i.e., the authority to correct a sentence based on a material mistake of fact about the defendant's record, will usually be in the form of a challenge to factual information relied on by the district court that is later determined to be false. Such a challenge is similar to a claim of newly discovered evidence that might justify a new trial, and may be brought by motion for a new sentencing hearing.

THE SENTENCE IS NOT AN ILLEGAL SENTENCE

The Edwards (supra) Court defined what is an illegal sentence:

> We emphasize that a motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment. Motions to correct illegal sentences address only the facial legality of a sentence. An "illegal sentence" for purposes of a statute identical to NRS 176.555 was defined by the District of Columbia Court of Appeals as **"one 'at variance with the controlling sentencing statute,' or "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided...."** Allen v. United States, 495 A.2d 1145, 1149 (D.C.1985) (quoting Prince v. United States, 432 A.2d 720, 721 (D.C.1981) and Robinson v. United States, 454 A.2d 810, 813 (D.C.1982)). A motion to correct an illegal sentence "presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence." Id. A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot, however, be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing.

A motion to correct an illegal sentence presupposes a valid conviction. The defendant is now trying to argue the validity of his conviction which must be brought by a Writ of Habeas Corpus. The motion must be denied as it is an inappropriate form and the defendant must file a Writ.

DEFENDANT'S MOTION MUST BE DENIED

The Edwards Court stated in a footnote that such motions as filed by the defendant must be denied:

> We have observed that defendants are increasingly filing in district court documents entitled "motion to correct illegal sentence" or "motion to modify sentence" to challenge the validity of their convictions and sentences in violation of the exclusive remedy provision detailed in NRS 34.724(2)(b), in an attempt to circumvent the procedural bars governing post-conviction petitions for habeas relief under NRS chapter 34. We have also observed that the district courts are often addressing the merits of issues regarding the validity of convictions or sentences when such issues are presented in motions to modify or correct allegedly illegal sentences without regard for the procedural bars the legislature has established. **If a motion to correct an illegal sentence or to modify a sentence raises issues outside of the very narrow scope of the inherent authority recognized in this Opinion, the motion should be summarily denied.** (emphasis added).

CONCLUSION

A motion to correct an illegal sentence is not the proper forum to raise issues of double jeopardy, sufficiency of the evidence or the constitutionality of a Statute, thus the State respectfully requests the motion be denied.

Sentence Reconsider Modify Mistaken Assumption

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO POST-CONVICTION MOTION TO RECONSIDER AND/OR MODIFY SENTENCE

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, District Attorney of Washoe County and , Deputy District Attorney and hereby submits its opposition to defendant's Post-Conviction Motion to Reconsider and/or Modify Sentence addressed to the State on . This Opposition is based on the attached Points and Authorities, all pleadings and papers on file herein and any evidence or argument taken or heard on the matter.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF FACTS

ARGUMENT

While the post-conviction remedy of Habeas Corpus has a time limitation, there are two recognized challenges to judgments of conviction that are without a procedural time bar: a motion to correct a facially illegal sentence and a motion to modify a sentence.[21] Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992). The latter motion, proposed by the defendant here is permitted if a due process violation occurs at sentencing. Id. However, this legal vehicle rests upon "...very narrow due process grounds..." Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 324 (1996). Such grounds have been reinterpreted and limited to a sentencing judge's mistaken assumption about a defendant's criminal record. Our court has stated: "We emphasize that a motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment."[22] Edwards, supra, Nev. at 708, P.2d at 324. See also, State Dep't of

[21]The trial court has jurisdiction and inherent authority to address such motions whenever raised. This is an exception to the statutory bar under NRS 176A.400 (formerly NRS 176.1853(2)).

[22]The Edwards court put an express limitation upon the previous line of cases that suggested that any mistake of material fact could be sufficient for a motion to modify a sentence. In the prior case of Passanisi, Id., at Nev. 320, P.2d at 1372, the court analyzed the prior decisions and summarized the former criteria as: "...we note that the trial court has inherent authority to correct a sentence at any

Prisons v. Kimsey, 109 Nev. 519, 522, 853 P.2d 109, 111 (1993) citing State v. District Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048-1049 (1984).

The defendant suggests that the recent case of Gibson v. State, 111 Nev. 1450, 907 P.2d 166 (1995) supports the prior Warden[23] line of cases for a relaxed standard to obtain modification of sentence. Perhaps more significantly, the defendant proposes a new legal vehicle for sentence modification beyond Warden, namely the production of evidence suggesting defendant rehabilitation. This however is not the state of the law. Not only does Gibson pre-date Edwards, more importantly, the Gibson holding stands for a different proposition than suggested by the defendant here. Rather, the Gibson court held that it would deny the State relief because "...it failed to take action for many years prior to appellant's release from federal custody.[24]" Id., Nev. at 1450, P.2d at 167.

The legal effect of the defendant's proposition would be to further expand the "narrow due process grounds" already delineated by our court. The practical effect would be the crafting and increased filing of post-conviction motions under the instant and similar relief titles that are thereby not subject to the statutory time limitations expressed by the Legislature and approved by our Court. This practice if permitted would further erode the remaining semblance of finality for victims of crime and our justice system that serves them as well as the criminally accused.

Here, there was no mistake made by this court as the defendant's criminal record. The Presentence Investigation Report stated that the defendant had no criminal record whatsoever predating the instant offense. Absent any such mistake, there is no legal basis for the defendant's request for modification.

---

time if such sentence was based on a mistake of material fact that worked to the extreme detriment of the defendant." [Citations omitted].

[23]See Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967); analyzed and cited in Edwards v. State, supra.

[24]While the court did discuss defendant Gibson's rehabilitative efforts over the years, the State contends that it did so in a balancing analysis against the State's failure to act for the same time frame. This appears akin to a laches-type approach wherein the State was found to have sat too long on their otherwise valid prosecution efforts.

Additionally, there is no merit to the claim that her criminal behavior was symptomatic of an impaired mental or emotional state that would mitigate for an evidentiary hearing on the matter.

CONCLUSION

Dated this _____ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____

Deputy District Attorney

Sentence Reconsider Mistake or Criminal Record

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THERE IS NO CRIMINAL STATUTE ALLOWING A RECONSIDERATION OF A SENTENCE

The defendant does not and cannot cite to any authority allowing a Court to reconsider a sentence fifteen (15) days after a judgment has been filed. There is no avenue by which a criminal court may reconsider a sentence that is not illegal, based on a material misapprehension of a defendant's criminal record, or the result of a clerical error.

THE COURT DOES NOT HAVE THE ABILITY TO RESENTENCE THE DEFENDANT

The Court may correct an illegal sentence, NRS 176.55, or correct a clerical mistake, NRS 176.565, or modify a sentence based on mistake of the defendant's criminal record but the Court does not have the authority to resentence a defendant for any other reason. And the Court can only "correct, vacate or modify a sentence that is based on a materially untrue assumption or mistake of fact that has worked to the extreme detriment of the defendant, **but only if the mistaken sentence "is the result of the sentencing judge's misapprehension of a defendant's criminal record."** Edwards v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996).

This issue was thoroughly discussed by the Court in Edwards v. State 112 Nev. 704, 918 P.2d 321 (1196) in which the Court held:

> Beginning with Peters, this court established a line of cases in which we ruled, based on due process considerations, that the district court has inherent authority to correct, vacate or modify a sentence that is based on a materially untrue assumption or mistake of fact that has worked to the extreme detriment of the defendant, **but only if the mistaken sentence "is the result of the sentencing judge's misapprehension of a defendant's criminal record.**" State v. District

Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048 (1984) (emphasis added); see also Passanisi v. State, 108 Nev. 318, 320, 831 P.2d 1371, 1372 (1992); Staley v. State, 106 Nev. 75, 79-80, 787 P.2d 396, 398 (1990).

THE SENTENCE IS NOT AN ILLEGAL SENTENCE

The Edwards (supra) Court defined what is an illegal sentence:

> We emphasize that a motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment. Motions to correct illegal sentences address only the facial legality of a sentence. An "illegal sentence" for purposes of a statute identical to NRS 176.555 was defined by the District of Columbia Court of Appeals as **"one 'at variance with the controlling sentencing statute,' or "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided...."** Allen v. United States, 495 A.2d 1145, 1149 (D.C.1985) (quoting Prince v. United States, 432 A.2d 720, 721 (D.C.1981) and Robinson v. United States, 454 A.2d 810, 813 (D.C.1982)). A motion to correct an illegal sentence "presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence." Id. A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot, however, be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing.

In our case the sentence is within the controlling statute and thus is not an illegal sentence.

DEFENDANT'S MOTION TO RESENTENCE MUST BE DENIED

The Edwards Court stated in a footnote that such motions as filed by the defendant must be denied:

> FN2. We have observed that defendants are increasingly filing in district court documents entitled "motion to correct illegal sentence" or "motion to modify sentence" to challenge the validity of their convictions and sentences in violation of the exclusive remedy provision detailed in NRS 34.724(2)(b), in an attempt to circumvent the procedural bars governing post-conviction petitions for habeas relief under NRS chapter 34. We have also observed that the district courts are often addressing the merits of issues regarding the validity of convictions or sentences when such issues are presented in motions to modify or correct allegedly illegal sentences without regard for the procedural bars the legislature has established. **If a motion to correct an illegal sentence or to modify a sentence raises issues outside of the very narrow scope of the inherent authority recognized in this Opinion, the motion should be summarily denied.** (emphasis added).

Sentence Suspend or Modify Mistake

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR MODIFICATION OF CURRENT SENTENCE STRUCTURE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, and , Deputy District Attorney, to oppose defendant's Motion for Modification of Current Sentence Structure. The State's opposition is based upon the following Points and Authorities, all documents, pleadings, transcripts and records previously filed in this case, and any and all other matters including any oral arguments which have been or may be brought before this Court.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

In Nevada, "only after a judgment of conviction is 'signed by the judge and entered by the clerk,' as provided by NRS 176.105, does it become final and does the defendant begin to serve a sentence of imprisonment." Miller v. Hayes, 95 Nev. 927, 929 (1979). Further, "a district court generally lacks jurisdiction to suspend or modify a sentence after the defendant has begun to serve it." Staley v. State, 106 Nev. 75, 79 (1990). The Staley court, citing Warden v. Peters, 83 Nev. 298 (1967), noted that "exceptions to this rule have been make when a court has made "a mistake in rendering a judgment which works to the extreme detriment of the defendant." Id. as 79. Later, in State v. District Court, 100 Nev. 90 (1984), the Nevada Supreme Court held that "if a sentencing court pronounces sentence within statutory limits, the court will have jurisdiction to modify, suspend or otherwise correct that sentence if it is based upon materially untrue assumptions or mistakes which work to the extreme detriment of the defendant." Id. at 97. That court pointed out that the district court's authority in such matters is founded on the due process rights of a defendant and specifically noted "that not every mistake or error which occurs during sentencing gives rise to a due process violation. The cases implicitly recognize [that] ... a due process violation arises only when the errors result in 'materially untrue'
assumptions about a defendant's record." Id. at 97. (emphasis added).

In this case the defendant was sentenced on May 12, 1998. That sentence has been finalized because it has been signed by the judge and entered by the clerk. NRS 176.015. Since there has been no assertion by the defendant that the sentence was based on an untrue assumption about his record nor that the sentence was outside the statutory limits, the State respectfully submits that this court lacks the jurisdiction to grant the relief sought by the defendant. Therefore, the State requests that defendant's motion be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Sentencing Memorandum Habitual Criminal

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

SENTENCING MEMORANDUM

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, District Attorney of Washoe County and , Deputy District Attorney and hereby submits a Memorandum of Law for the sentencing hearing of the defendant scheduled for

This Memorandum is based on the attached Points and Authorities, all pleadings and papers on file herein and any

testimony taken and documents admitted at a hearing on this matter. DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS
II. ARGUMENT

Our law requires that a separate count be filed when alleging and requesting an adjudication of Habitual Criminal status when an Information is filed. Accord, Howard v. State, 83 Nev. 53, 56, 422 P.2d 548, 550 (1967).[25] NRS 207.010(2) states:

> "It is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality if an indictment is found. The trial judge may at his (sic) discretion, dismiss a count under this section which is included in any indictment or information."

After notice is filed, the court's task is to then conduct a hearing on the allegation of Habitual Criminal.[26] This hearing involves several concomitant components.

First, the court is to weigh the appropriate factors for and against the habitual criminal enhancement.[27] Clark v. State, 109 Nev. 426, 851 P.2d 426 (1993). The purpose behind habitual criminal status is to increase sanctions for the recidivist and to discourage repeat offenders. Odoms v. State, 102 Nev. 27, 32, 714 P.2d 568, 571 (1986). If the court does not find that it would be "just and proper" for the application of the habitual criminal status, it may dismiss the count. Clark, supra, Nev. at 428. The court

---

[25]See, McGervey v. State, 114 Nev.Adv.Op 56, at 5, 958 P.2d 1203, 1207 (1998) where the defendant was charged with being a habitual criminal by Amended Information. See also, Parkerson v. State, 100 Nev. 222, 224, 678 P.2d 1155, 1156 (1984), where the court stated that the habitual criminal allegation "...is typically included in the charging document..." The purpose of such a pleading is to provide notice of the State's allegation, not to charge a crime, therefore, no right to jury trial on the allegation exists. Accord, Hollander v. Warden, Nev. State Prison, 86 Nev. 369, 468 P.2d 990 (1970).

[26]"One facing adjudication as a habitual criminal...is at the mercy of the court and is thus subject to *the broadest kind of judicial discretion*." Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997), citing Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). [Emphasis in original].

[27]"NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court." Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996), citing Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

has the discretion to dismiss the count "where an adjudication of habitual criminality would not serve the purposes of the status or interests of justice." Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990) citing French v. State, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982).

Second, the court must be satisfied beyond a reasonable doubt of the identity of the person and conviction of prior felonies as proved by the State. Howard, supra. A certified copy of a prior conviction is prima facie evidence for a prior felony alleged in the notice. Id., Nev. at 57.

Third, the court should examine the proof of each of the prior felony convictions pled that support the habitual criminal allegation for constitutional muster.[28] McAnulty v. State, 108 Nev. 179, 181, 826 P.2d 567, 569 (1992); Crutcher v. District Court, 111 Nev. 1286, 903 P.2d 823 (1995). Namely, "...there must be an affirmative showing that the defendant was represented by counsel, or knowingly waived that right in the prior felony proceedings." Burns v. State, 88 Nev. 215, 220, 495 P.2d 602, 605, (1972), citing Hamlet v. State, 85 Nev. 385, 387, 455 P.2d 915, 916 (1969).

If the court makes a finding that it would be just and proper for the defendant to be adjudicated as a habitual criminal; and that the State has established identity; and that the statutory number of prior felonies have been noticed, proved by the State and are constitutionally valid, the court then invokes the recidivist statute. The court then has the option of applying either the "major habitual criminal statute" or the "little habitual criminal statute" if the circumstances so warrant. Staley v. State, 106 Nev. 75, 78, 787 P.2d 396, 398 (1990). Thereafter, the appropriate recidivist sentence is imposed in lieu of the otherwise appropriate term by the ordinary statutory sentencing scheme.[29] Staude v. State, 112 Nev. 1, 7,

---

[28]The court can consider a defendant's stipulation that he was convicted of prior felonies pled by the State as going to overall proof of identity and the fact of conviction, as the defendant stipulated here in the hearing of July 7, 1999. However, the court must nonetheless examine the documentation of prior felony convictions for their constitutional validity; similar to the scrutiny protocol for documents offered to enhance a DUI penalty.

[29]Should the court so adjudicate the defendant and sentence him in the instant case under this section, the court will then be called upon to sentence the defendant to the ordinary statutory sentencing scheme in the two companion cases.

908 P.2d 1373, 1377 (1996), citing Cohen v. State, 97 Nev. 166, 625 P.2d 1170 (1981); Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966).

III. CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Sentencing Level of Information Available to Court

CODE
Richard A. Gammick
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Williams v. New York, 337 U.S. 242 (1949) is the seminal case dealing with the broad amount of information a trial court is entitled to consider in imposing a sentence. It has been cited with approval in dozens of subsequent United States Supreme court decisions as well as in literally hundreds of other decisions from other federal and state appellate courts. See, e.g., Williams v. Oklahoma, 358 U.S. 576, 584 (1959); Gregg v. Georgia, 428 U.S. 153, 189 (1976); United States v. Grayson, 438 U.S. 45, 48-49 (1978); Unites States v. Plisek, 657 F.2d 920, 927 (7th Cir. 1986); United States v. Wise, 603, F.2d 1101, 1105 (4th Cir. 1979); Eyman v. Alford, 448 F.2d 306 314, 315 (9th Cir. 1969); Arizona v. Cawley, 648 P.2d 142, 144 (Arizona 1982).

In Williams, the United State Supreme Court gave an extended discussion regarding the broad discretion trial judges have in considering information that would not be admissible at trial on the merits.

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But before and since the American colonies became a nation, courts in this country and in England practiced a policy in which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and background of convicted offenders. A recent manifestation of the historical altitude allowed sentencing judges appears in Rule 32 of the Federal rules of Criminal Procedure. That rule provides for consideration by Federal Judges of reports made by probation officers containing information about a convicted defendant, including such information 'as may be helpful in imposing a sentence or in granting probation or in the correctional treatment of the defendant...'
>
> In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to

> evidence that is strictly relevant to the particular events charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant --- if not essential --- to [the trial judges] selection of an appropriate sentence is possession of the fullest information possible concerning the defendants life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. Williams, 337 U.S., at pp. 246-247.

In United States v. Plisek, 657 F.2d 920 (1981), the Seventh Circuit relied heavily on Williams in approving a trial court judges consideration of the facts and circumstances relating to a prior case in which the subject defendant had been acquitted following trial. Id., at page 927. In Plisek the court stated:

> [T]he scope of a sentencing judge's discretion is wide, and in making the sentencing determination, 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' United States v. Tucker, 912 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). While it has been suggested that consideration of mere arrests or pending charges be prohibited in reaching the sentencing determination, United States v. Johnson, 507 F.2d 826, 832 (7th Cir. 1974), cert denied, 421 U.S. 949, 95 S.Ct. 682, 44 L.Ed.2d 103 (1975) (concurring and dissenting opinion) (Swygert, C.J.), the legislature has chosen to permit a far broader inquiry into 'the background, character and conduct' of a convicted defendant. 18 U.S.C. §3577 (1976). A broad interpretation of this language finds support in the legislative history of §3577, which makes it clear that the section was intended to 'maximize sources of sentencing information [and] to guard against the unnecessary formalization of sentencing procedure.' Rep. No. 91-617, 91st Cong., 1st Sess 90 (1969), quoted in United States v. Williamson, 567 F.2d 610, 615 (4th Cir. 1977). This legislative mandate reflects a sentencing philosophy articulated by the Supreme Court in Williams v. New York. Plisek, Id. at p.927.
>
> The Plisek court then went on to quote from the Williams decision before concluding that:
>
> [The] Williams court intended that full knowledge of the defendant's entire background should be available to the sentencing court... we

> believe that under this broad grant of sentencing discretion the trial court did not err in referring to information in the presentence report concerning the circumstances surrounding a prior acquittal, particularly in view of the wide latitude of response to the information permitted to the defendant. Plisek, Id. at p.927.

In the case at bar, the State is not seeking to introduce factual evidence regarding prior events for which the defendant has been acquitted. The State is merely seeking to introduce evidence of prior uncharged misconduct by the defendant. More importantly, in Plisek the trial judge considered facts related to the acquitted charge which were heresy contained in a pre-sentence report. Plisek, p.927

In Arizona v. Cawley, 648 P.2d 142 (Arizona 1982), the defendant was convicted in the court below of three counts of child molesting. On appeal, he challenged the trial judge's consideration of heresy information regarding past evidence of peculiar sexual behavior. This heresy information was in the form of a pre-sentence report and a report from his United States navy record. The appellate court upheld the trial court's consideration of this heresy evidence regarding the defendant's abnormal sexual behavior, even though none of the prior incidents resulted in convictions. Cawley, id, at p.144. Again, in the case at bar the State will not be seeking to introduce heresy information regarding misconduct for which the defendant has not been convicted. Instead, the State will place a live witness on the stand who has first-hand knowledge of the events she will be testifying to.

In Smith v. State, 517 A.2d 1081 (MD. 1986), the Maryland Court of Appeals held that testimony concerning a rape defendants alleged participation in an uncharged, unrelated attempted rape of another woman was properly admitted at the sentencing hearing, even though no charges had ever been filed in the attempted rape case. The defendant argued that the testimony was unreliable because no formal charges had been filed. The Court rejected this claim and noted that the victim's testimony was not to be deemed incredible simply because she had not pressed charges. The Court noted she was sworn to tell the truth at sentencing hearing and was subject to cross examination. Smith, id, at pp. 1082-1088. Smith is squarely on point to the issue presented to this Court and a copy of the opinion is attached hereto for the Court's consideration.

NRS 175.552 deals with the evidence that may be considered at the penalty/sentencing hearing in first degree murder cases. That section provides:

> In the hearing, evidence may be presented concerning aggravated and mitigating circumstances relative to the events, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible. NRS 175.552(3).

This section makes clear that the Nevada legislature intended that the sentencing body in first degree murder cases be allowed to consider the broadest amount of information possible.

The Nevada legislature has also made clear that a broad amount of information may be considered by the sentencing court in cases other than first degree murder. NRS 176.145(1)(a)(b) provides that the pre-sentence report compiled to assist the judge at sentencing must contain information regarding the prior criminal record of the defendant and "such information about his characteristics, his financial condition, the circumstances effecting his behavior and the circumstances of the offense, as may be helpful in imposing sentence..."

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Severance Full Discussion

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTIONS TO SEVER DEFENDANTS
MOTION RE: INADMISSIBLE EVIDENCE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, Deputy District Attorney, and files this OPPOSITION TO MOTIONS TO SEVER DEFENDANTS, MOTION RE INADMISSIBLE EVIDENCE (hereinafter, "Opposition"). The Opposition is pursuant to Lisle v. State, 113 Nev. 679 (1997), Jones v. State, 111 Nev. 850 (1995), U.S. v. Enriquez-Estrada, 999 F.2d 1355 (9th Cir. 1993), the attached Points and Authorities incorporated herein by this reference, and any oral argument deemed appropriate by this Court.

Dated this _____ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

The first argument in the defendant's motion is that severance is required pursuant to Bruton v. United States, 391 U.S. 123 (1968). While the State concedes that Bruton is still applicable in cases involving multiple defendants, it will not concede that simply because there are multiple defendants who have given statements severance is required. The 9th Circuit Court of Appeals has addressed this issue recently in U.S. v. Enriquez-Estrada, 999 F.2d 1355 (9th Cir. 1993). Enriquez-Estrada was a case dealing with three defendants. The prosecution admitted statements of defendants which were "sanitized" by the use of the term "individuals" rather than the co-defendant's actual names. Further, the jury was properly instructed regarding these statements. Id., 999 F.2d at 1359.

The Appeals Court held in Enriquez-Estrada that the procedure discussed above removed any potential Confrontation Clause issues under Bruton. The Court went on to state:

> The Supreme Court subsequently illuminated the Bruton holding in Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). First, the Supreme Court clarified that only those statements that "expressly implicate" the defendant or are "powerfully incriminating" implicate the Bruton rule. Id at 208, 107 S.Ct. at 1707. Second, the Supreme Court concluded that where the statement is not incriminating on its face, but becomes so only when linked with evidence introduced later at trial, and where the statement has been redacted to eliminate not only the defendant's name, but any reference to his existence, then a limiting jury instruction adequately will protect defendant's Confrontation Clause rights. Id. at 211, 107 S.Ct. at 1709. Enriquez-Estrada, 999 F.2d at 1359.

The State has not had the opportunity to redact the statements of each defendant in the present action. It intends to do so, and will provide copies to all parties when such redaction has occurred. This will be in conformity with Marsh and Enriquez-Estrada. Given the fact that the redaction has not yet occurred, this portion of the defendant's motion is premature.

The defendant's motion argues his defenses may be antagonistic to his co-defendant, consequently they are entitled to separate trials. The Nevada Supreme Court addressed the antagonistic defense issue in Jones v. State, 111 Nev. 850 (1995). In Jones, one defendant sought severance from a co-defendant because "he would suffer guilt by association and that the jury would not be able to compartmentalize the evidence against [him] as opposed to the evidence against [his co-defendant]." Id., 111 Nev. at 853. The Supreme Court upheld the denial of the motion to sever. In its opinion the Supreme Court states:

> We have held that "[t]he decision to sever is left to the discretion of the trial court." Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990); *see also* Schaffer v.

United States, 362 U.S. 511, 516 (1960). Moreover, it is well settled that where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary. United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir. 1980); United States v. Silla, 555 F.2d 703, 707 (9th Cir. 1977).

The general rule favoring joinder has evolved for a specific reason-there is substantial public interest in joint trials of persons charged together because of the judicial economy involved. Jones, 111 Nev. at 853.

The Supreme Court goes on to state:

Ultimately, however, the question is whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants. (Citations omitted). While there are situations in which inconsistent defenses may support a motion for severance, the doctrine is a very limited one. United States v. Haldeman, 559 F.2d 31, 71 (D.C. Cir. 1976). Under the Haldeman standard, a defendant moving for severance must show that:

> "the defendants [have]conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty."

Id. (quoting Rhone v. United States, 365 F.2d 980, 981 (D.C. Cir. 1966)).

The United States Supreme Court has recently held that mutually antagonistic defenses are not prejudicial per se. Zafiro v. United States, ___ U.S. ___, 113 S.Ct. 933(1993). Jones, 111 Nev. at 854.

In Lisle v. State, 113 Nev. 679 (1997), the Nevada Supreme Court again addressed the issue of severance. The Court states:

> Severance of defendants will not be granted if based on "guilt by association" alone. United States v. Boffa, 513 F.Supp. 444, 487 (D. Del. 1980). Merely having a better chance at acquittal if the defendants are tried at separate trials is not sufficient to establish prejudice. United States v. Baker, 10 F.3d 1374, 1388 (9th Cir. 1993), *cert. denied*, 513 U.S. 934 (1994). In addition, a defendant is not entitled to a severance merely because the evidence admissible against a co-defendant is more damaging than that admissible against the moving party. Id. Lisle, 113 Nev. at 689-90.

The defendant's motion fails to meet the standards announced in Jones and Lisle, and the case law contained therein. The antagonistic defenses, should any actually exist, have not been demonstrated to be such that a jury would be unable to decide the case fairly for each defendant. For this reason, the defendant's severance motion should not be granted.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Severance

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION TO SEVER

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Nevada law provides for the severance of defendants in specific circumstances.

> 1. If it appears that the defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance or defendants or provide whatever other relief justice requires.

NRS 174.165.

In determining whether circumstances warrant a severance, the court must consider not only the possible prejudice to the defendant but also the possible prejudice to the Government resulting from two time-consuming, expensive and duplicitous trials. *Lisle v. State*, 113 Nev. 679, 941 P.2d 459, 466 (1997) citing United States v. Andreadis, 238 F.Supp. 800, 802 (E.D.N.Y. 1965).

The defendant's request for a severance of his trial should be denied for several reasons. First, the defendant has not shown "good cause" why he is entitled to a severance. Second, proper jury instructions would cure any improper prejudice to the defendant.

1. The Defendant has not Shown Good Cause

A defendant is entitled to a separate trial if he presents a sufficient showing of facts demonstrating that substantial prejudice would result in a joint trial. *Amen v. State*, 106 Nev. 749, 755, 801 P.2d 1354 (1990).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____

Deputy District Attorney

Severance Bruton Issues

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

ISSUE PRESENTED: SHOULD DEFENDANT MINARD BE SEVERED FROM HIS CODEFENDANTS IN THE TRIAL FOR THE MURDER OF ESTABAN ADAME?

NRS 174.155 provides: "The Court may order two or more Indictments or Informations or both to be tried together if the

offenses, and the defendants, if there is more than one, could have been joined in a single Indictment or Information. The procedure shall be the same as if the prosecution were under such single Indictment or Information.

The basis for the defendant's Motion is claimed to be a violation of the defendant's right to confront and cross examine accusatory witnesses. In support of this proposition the defendant cites Bruton v. United States, 391 U.S. 123 (1968) and Ducksworth v. State, 113 Nev. 780 (1987). In both, Bruton and Ducksworth, which both stand for the proposition that if a codefendant's confession, inculpating the other codefendant, is admitted at trial and the defendant making the statement does not testify at trial, the non-confessing codefendant is denied his Sixth Amendment right to confront his accusers. That factual scenario is not presented in the instant case as the defendants have not confessed.

The most recent Nevada Supreme Court case addressing the severance issue on the basis of the confrontation clause is Buff and Pacheco v. State of Nevada, 114 Nev. Adv. Op. 131 (1998). In that case, the Supreme Court reiterated the law in Nevada as it applies to severance where the Supreme Court stated, "The decision to sever a joint trial is vested in the sound discretion of the District Court and will not be reversed on appeal unless the appellant 'carries the heavy burden' of showing that the trial judge abused his discretion. Amen v. State, 106 Nev., 106 Nev. 749, 755-56, 801 P.2d, 1354, 1359 (1990). This Court has held '[s]ome form of prejudice always exists in joint trials and such

occurrences are subject to harmless error review." Ewish v. State, 110 Nev. 221, 234, 871 P.2d 306 (1994); See NRS 178.598 (any trial defect not impacting substantial rights is disregarded); and Mitchell v. State, 105 Nev. 735, 738-39, 782 P.2d 1340, 1342-43 (1998) (harmless error standard apply to joinder of claims; court tacitly recognized that same standard apply to joinder of defendants)."

Id. at p.9.

In reversing the defendant Pacheco's Motion for Severance the Court held that since Pacheco was precluded from introducing evidence of Buff's initial statement to the police, where he claimed Pacheco was not involved in the killing, the Court was unable to find that the District Court's denial of Pacheco's Motion for Severance was harmless. The instant case presents no scenario where the defendant would be precluded from presenting exculpatory evidence. Curiously, absent from the defendant's Motion is any factual basis for severance on the basis of a "Bruton" issue. Further, the defendant fails to set forth any other factual basis for his claim of prejudice.

In light of the fact that none of the defendants have confessed, there is no "Bruton" issue and since the defendant cannot point to any specific prejudice, the defendant's Motion must be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Sexual Assault

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 200.366 provides that sexual assault consists of the following elements:

1. The defendant did willfully and unlawfully;

2. Subject another person to sexual penetration;

3. Against the victim's will.

The Supreme Court of Nevada has held that, "(P)hysical force is not a necessary element of the commission of rape." Dinkens v. State, 92 Nev. 74, 77, 546 P.2d 228, 230 (1976) and McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 574. Further, the Court has held that the sexual assault statute, "only requires the commission of the act of sexual penetration against the will of the victim." McNair, 108 Nev. at page 57, 825 P. 2d at page 574. The Court went on to say, "(A) rape victim is not required to do more than her age, strength, and the surrounding facts and attending circumstance would reasonably dictate as a manifestation of her opposition." McNair, 108 Nev. at page 57, 825 P.2d at page 574 and Dinkins, 92 Nev. at page 78, 546 P.2d at page 230. Finally, the Court concluded, "(I)n other words, whether the victim manifested opposition or did in fact consent, depends on the facts of the particular case." McNair, 108 Nev. at page 57, 825 P.2d at page 574.

It is clear from the holdings cited herein above that any determination whether or nor the victim consented to the act of sexual penetration by the defendant is based on the totality of circumstances surrounding that penetration. These circumstances also include the relationship between the victim and the defendant including the prior acts of violence committed by the defendant upon the victim. The victim's reasonable fear based on those prior violent acts of battery upon her are also part of the totality of circumstances that a jury should properly consider when deciding the key issue in this case of whether or not the victim consented to the defendant's sexual penetration of her. If the victim has been in a prior

physically abusive and violent relationship with the defendant prior to the act of sexual penetration, she is less likely to physically resist his actions and more likely to submit to him out of fear of physical violence. Therefore, the State respectfully contends that the evidence of the defendant's having committed battery upon the victim in the past is probative of the issues of whether or not the victim consented to the sexual penetration by the defendant and whether she reasonably demonstrated that lack of consent.

NRS 200.373 provides that, "(I)t is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force." In the instant case, the defendant and victim were separated, but nevertheless married at the time of the sexual assault.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Sixth Amendment Right to Confrontation

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. The right of confrontation is applicable to the states. Roberts v. Russell, 392 U.S. 293 (1968); Pointer v. Texas, 380 U.S. 400 (1965). Obviously, a face to face confrontation is the core value of the right. Introduction of a confession of a codefendant implicating another defendant violates a person's right of confrontation when the confessing defendant exercises his Fifth Amendment Right not to testify. A jury instruction telling a jury not to consider the codefendant's confession against another defendant does not cure a confrontation violation. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 476 (1968).

However, the use in a joint trial of a confession of a codefendant, who does not testify, which has been edited to remove all reference to the defendant's existence and which becomes incriminatory only through linkage provided by other evidence does not violate the Confrontation Clause so long as the jury is instructed not to use it against the defendant. Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). In Richardson, a joint murder trial involving Marsh and Evans, a confession of defendant Williams was redacted so as to "omit all reference" to his codefendant, Marsh. The statement did indicate that Williams and a third person had participated in the crime. Id. The redacted confession further indicated that Williams and a third person discussed the murder in the front seat of a car as they traveled to the victims house. There was no indication in the statement that Marsh was in the car. Id. The United States Supreme Court held that: "...the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the codefendants name, but any reference to his or her existence." Id., at p. 211.

The Supreme Court of the United States revisited this issue in Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). Defendants Bell and Gray were indicted for the murder

of Stacy Williams and they were tried jointly. Bell confessed to the crime and his confession implicated Gray. A redacted version of the confession was read to the jury by a detective and whenever the name of Gray or a third person appeared the detective said "deleted" or "deletion". The Court held that this confession which substituted blanks and the word "deletion" for Gray's name fell within the protective rule of Bruton. Id. 118 S.Ct. at 1157. The law does not require that statements be redacted so as *not to incriminate inferentially*. In endorsing this concept, the Gray Court stated, "We concede that Richardson placed outside the scope of Bruton's rule those statements that incriminate inferentially." 481 U.S., at p. 208, 107 S.Ct., at pp. 1707-08.

The Ninth Circuit in following the mandates of Gray, has held that a redaction of a statement replacing the codefendant's name with "person X" is also violative of the Bruton rule. United States v. Peterson, 140 F.3d 819, 822 (9th Cir.1998). Likewise, replacing a defendant's name with "someone who worked at FDA ... getting ready to retire" was error pursuant to Bruton. United States v. Gilliam, __ F.3d , 1999 WL 74145, (9th Cir. 1999).

Defendant misreads Gray v. Maryland, supra. Gray does not stand for the proposition that use of a neutral pronoun instead of a defendant's name violates the Confrontation Clause. The violation occurs when the jury can replace blanks or neutral pronouns with the codefendant's name, thus making reference to the other defendant obvious.

Redacted statements are admissible if the redactions are done properly and the Court gives the jury a proper limiting instruction. The rules of redaction set forth in Gray are easily followed in the instant case.

Redactions have been approved (after Gray) using a neutral pronoun or admission that does not facially incriminate or lead the jury directly to a nontestifying declarant's codefendant. United States v. Edwards, 159 F.3d 1117 (8th Cir. 1998). In Edwards, the defendants appealed their convictions and life sentences claiming that their Confrontation Clause rights, as defined in Bruton and its progeny, were violated by the government's reliance on testimony by numerous witnesses relating each defendant's out-of-court admissions of complicity, and by the district court's refusal to grant either their motions for severance or mistrial. In affirming the convictions the Edwards court stated:

> Defendants argue the government's repeated use of out-of-court admissions that "we" or "they" went to the site to steal, and "we" or "they" set the fire, violated Bruton as construed in *Gray*. [footnote omitted] Neither *Richardson* nor *Gray* discussed the admissibility of confessions in which codefendants' names are replaced with a pronoun or similarly neutral word, as in this case. This court and other circuit courts have consistently upheld such evidence **so long as the redacted confession or admission does not facially incriminate or lead the jury directly to a nontestifying declarant's codefendant**. See *United States v. Jones*, 101 F.3d 1263, 1270 & n.5 (8th Cir. 1996) (use of "we" and "they"); *United States v. Williams*, 936 F.2d 698, 700-01 (2d Cir. 1991) ("another guy"); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir. 1990) ("we"); *United States v. Garcia*, 836 F.2d 385, 390-91 (8th Cir.1987)("someone"). We conclude the district court's decision to admit nontestifying defendant admissions, redacted as to codefendants by the use of pronouns and other neutral words, and accompanied by appropriate limiting instructions, was consistent with this court's decisions in *Jones* and *Garcia* and the Supreme Court's recent decision in *Gray*."

Id. 158 F.3d 1117, at pp. 1125-26 (emphasis added).

Dated this _____ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By

Deputy District Attorney

Specific Intent Other Act Evidence

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Evidence of Prior Bad Acts Is Admissible To Establish And Prove Intent, And Absence Of Accident Or Mistake.

NRS 48.015 provides that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" NRS 48.025 excludes the admission of evidence that is not relevant.

NRS 48.035 provides as follows:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.
>
> 3. Evidence of another act or crime which is so closely related to an act in controversy or a crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

NRS 48.045(2) provides as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [Emphasis added].

By entering a plea of not guilty to the crimes alleged in the Information, TIETJEN placed her intent at issue in this case. McMichael v. State, 94 Nev. 184, 188 (1978). It is well settled that other acts evidence may be used to prove intent. See Hill v. State, 95 Nev. 327 (1979); Colley v. State, 98 Nev. 14 (1982); McMichael, supra, 94 Nev. 184; Findley v. State, 94 Nev. 212 (1978).

[N]o reference shall be made to such collateral offenses unless, during the state's case-in-chief, such evidence is relevant to prove motive, intent, identity, the absence of mistake or accident, or a common scheme or plan; and then, only if such evidence is established by plain, clear, and convincing evidence. Petrocelli, supra, 101 Nev. 46 (citing Carlson v. State, 84 Nev. 534, 537 (1968)).

In Margetts v. State, 107 Nev. 616 (1991), Margetts was a coin dealer who bought 100 gold "krugerrands" on credit from another dealer at a coin show. Margetts was supposed to pay the other dealer for the coins at the end of the week long show. During the week, Margetts sold the coins and lost all the proceeds in casino gambling. Margetts gave the other dealer a bad check; hence, failing to repay the debt.

Margetts was charged with obtaining money under false pretenses and swindling. At trial, Margetts testified that he had no intention of swindling the other dealer, and that he tendered the bad check by mistake.

The Supreme Court upheld the decision of the District Court wherein the State was permitted to present prior bad act evidence that Margetts had swindled the other dealer in the past to establish intent and absence of mistake. The Supreme Court held that Margetts placed his intent at issue, making prior bad act evidence admissible to prove intent, or absence of mistake. See also Brinkley v. State, 101 Nev. 676 (1985).[30]

---

[30] In Brinkley, 101 Nev. 676, the Supreme Court upheld the admission of prior bad act evidence wherein Brinkley was convicted of unlawfully obtaining a controlled substance or prescription, and of conspiracy to obtain a controlled substance or prescription. At trial, Brinkley claimed that the failure to disclose to each practitioner that he was receiving controlled substances from other practitioners was the result of an innocent mistake. The Supreme Court upheld the admission of prior bad act evidence showing that Drummond, subsequent to the occurrence of the substantive crimes, attempted to obtain a controlled substance by utilizing a forged prescription, while Brinkley waited outside in the car. The Supreme Court held that "[t]he forged prescriptions also tended to prove that Brinkley and Drummond planned and schemed to obtain numerous prescriptions for controlled substances; and the evidence logically tended to show a common plan or scheme.

In Margetts, 107 Nev. 616, Margetts had previously swindled the same dealer who he then swindled some time later. In this case, TIETJEN previously passed a forged/altered check to the Plantation, and has now passed checks at the Rail City Casino without having sufficient funds in her account. Thus, the facts in Margetts, 107 Nev. 616, and this case are starkly similar.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Speedy Trial

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

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Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant first contends that his Sixth Amendment right to a speedy trial has been denied. Defendant cites several general speedy trial cases for the proposition that the defendant's trial has been unnecessarily delayed. However, these general cases do not address the specific issue at hand -- i.e., where the delay was caused by the defendant's former entry of plea and subsequent imprisonment pursuant to said plea.

A speedy trial violation does not occur where the delay is caused by the actions of the defendant or defense counsel. Williams v. State, 93 Nev. 405, 406 (1977).

In determining whether a delay amounts to a denial of defendant's constitutional right to a speedy trial, four factors are to be considered: 1) The length of the delay; 2) The reason for it; 3) The defendant's assertion of his right; and 4) Resulting prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 92 S.Ct. 2182 (1972); Sheriff v. McKinney, 93 Nev. 313, 314 (1977).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Spousal Privilege Child Sexual Assault

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 49.295 sets forth the marital privilege. However, the statute also sets forth several exceptions which render the privilege inapplicable. NRS 49.295(2) provides in pertinent part:

> 2. The provisions of Subsection 1 do not apply to a:
> ...
> (e) Criminal proceeding in which one spouse is charged with:
> (1) A crime against the person or the property of the other spouse or of a child of either, **or of a child in the custody or control of either**, whether the crime was committed before or during the marriage.
> (Emphasis added).

In Meador v. State, 101 Nev. 765 (1985), the Nevada Supreme Court addressed the issue at hand. In that case the defendant was not related to the various female victims, all of whom were between the ages of eight and twelve. Appellant and his own daughter went with the victims on various outings, including swimming, horseback riding, and trips to the movies. The victims also went to the defendant's residence for "stay overs" with the victim's daughter. The defendant's wife and a second daughter also resided with the defendant at the residence. The defendant was charged with multiple counts of Lewdness and Sexual Assault for allegedly molesting various girls at public swimming pools, at movies, at the ranch where the horseback outing occurred, as well as in his home.

At trial the girls testified that they did not report the incidents immediately because they did not understand what was happening to them, and because they were scared or embarrassed. The victims ranged in age from eight to twelve. At trial an expert testified that the girls' silence was typical of molested children because children under the age of 12 years are not aware of their sexual identities and are incapable of making abstract judgements. The victims were all friends of the defendant's 11-year-old daughter. Meador, Id., at pp. 766-767.

On appeal Meador contended that the District Court erred in allowing his wife to testify against him after he had invoked the marital privilege.

The Nevada Supreme Court held that the husband and wife privilege was inapplicable pursuant to Subsection 2(e)(1). (See full quotation above.)

The Nevada Supreme Court stated: The statute plainly provides that the privilege is inapplicable where the spouse invoking the privilege has been charged with a crime against a child in the custody or control of either spouse. The record indicates that appellant had physical control over the girls during the molestations. We conclude that appellant's physical control over the girls at the time of the molestation satisfies the requirements of the exception to the privilege. Meador, Id., at p. 768.

CONCLUSION

The defendant's contention that the marital privilege applies in the context of the present case is without merit.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

State of Mind Hearsay Exception

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

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THE STATE OF NEVADA,

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The State respectfully contends that the proffered testimony is admissible under two exceptions to the hearsay prohibition of NRS 51.065. Those exceptions are NRS 51.105, Then existing mental, emotional, or physical condition, and NRS 51.345, Statement against interest.

1. NRS 51.105, Then existing mental, emotional, or physical conditions. This statute states in pertinent part: 1. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule.

The Supreme Court of Nevada addressed this issue in Beddow v. State, 93 Nev. 619, 572 P.2d 526 (1977). In that case, officers of the Las Vegas Metropolitan Police Department were called to a residential mobile home park on a civil disturbance report. Upon arrival officers met the complaining party who was a neighbor of the defendant's. This party told officers that the defendant was intoxicated and possibly had a revolver in his possession. Acting on this information, officers went to the defendant's mobile home. The defendant, who was inside his mobile home, was drinking a beer and had a pistol visible in his waist band. Officers told him to keep his hands at his side. The defendant stepped toward the door of his residence. As he did so, officers could no longer see his revolver, and at the same time the defendant moved his hand around his back. Fearing for their safety and that of the defendant, officers entered his residence and tried to disarm him. The defendant resisted their

attempts to disarm him and to place him under arrest. He was charged with obstructing and resisting officers in the performance of their duties. At trial, the court allowed the officers to testify to the statements made by the neighbor to the officers to the effect that the defendant was intoxicated and possibly had a revolver. The Supreme Court upheld the trial court in this regard. The Supreme Court found the neighbor's statements to officers to be hearsay as it was an out of court statement offered to prove the matter asserted. However, the Court went on to find that one of the issues at trial was how the officers reacted to the defendant when he refused to keep his arms at his side and away from the revolver. Therefore, the Court held that the statements by the neighbor to officers were admissible under NRS 51.105. The Court stated:

> Whenever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned.

See, Beddow, 93 Nev. at page 623, 572 P.2d at page 529. The Court went on to state, "(A)s the officers' response to this behavior was an issue, the testimony of the officers concerning the neighbor's statements was, as an exception to the hearsay rule, relevant to evidence of their then existing states of mind." Again see, Beddow, 93 Nev. at page 624, 572 P.2d 529.

Additionally, in Beddow, the trial court gave a limiting instruction limiting the jury's use of the neighbor's statements to evaluating the officers' state of mind when they entered the defendant's residence. In the instant case, should this Honorable Court rule the proffered testimony admissible, a similar limiting instruction could be given to the jury.

The Court reaffirmed its holding in this regard in Cunningham v. State, 113 Nev. 897, 944 P.2d 261 (1997) and Wallach v. State, 106 Nev. 470, 796 P.2d 224 (1990). The Court held in both cases that "...if a statement was merely offered to show that the statement was made and the listener was affected by it, then the statement was not offered for the truth and is admissible as non-hearsay." See Cunningham, 944 P.2d 266 and Wallach, 106 Nev. at page 473 and 796 P.2d at page 227.

Therefore, the State respectfully requests that this Honorable Court find that the proffered testimony is admissible based on the argument made herein under the provisions of NRS 51.105.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Statement Admissibility Full Discussion

CODE 2645
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendants.

_____/

OPPOSITION TO MOTIONS TO SUPPRESS EVIDENCE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, Deputy District Attorney, and files this OPPOSITION TO MOTIONS TO SUPPRESS EVIDENCE (hereinafter, "Opposition"). The Opposition is pursuant to the United States Constitution, the Nevada Constitution, Colorado v. Connelly, 479 U.S. 157 (1986), Oregon v. Mathiason, 429 U.S. 492 (1977), Miranda v. Arizona, 384 U.S. 436 (1966), Jackson v. Denno, 378 U.S. 368 (1964), Mitchell v. State, 114 Nev. 1417, 971 P.2d 813 (1998), State v. Taylor, 114 Nev. 1071, 968 P.2d 315 (1998), Alward v. State, 112 Nev. 141 (1996), Falcon v. State, 110 Nev. 530 (1994), Rowbottom v. State, 105 Nev. 472 (1989), Passama v. State, 103 Nev. 212 (1987), Pendleton v. State, 103 Nev. 95 (1987), Wilkins v. State, 96 Nev. 367 (1980), the attached POINTS AND AUTHORITIES incorporated herein by this reference, and the oral argument required by law at a time set by this Court.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

Statements made by a defendant to police fall into two categories: pre-*Miranda* statements and post *Miranda* statements. The statements are governed by different bodies of case law. The defendants motions address both types of statement, therefore the State of Nevada will discuss both areas of inquiry.

As a preliminary matter, the issue of the inadmissibility of a defendant's statement must be raised by the defendant. Wilkins v. State, 96 Nev. 367, 372 (1980). A hearing must be held outside the presence of the jury to determine if a statement was voluntary. Jackson v. Denno, 378 U.S. 368 (1964). The burden that the State of Nevada bears is only a showing of a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168 (1986)(citations omitted), and Falcon v. State, 110 Nev. 530, 534 (1994).

In the seminal case of Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court required police to advise individuals of certain Constitutional rights prior to custodial interrogation. "Custody" is defined as "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Alward v. State, 112 Nev. 141, 154 (1996)(citing California v. Beheler, 463 U.S. 1121, 1125 (1983)). When an individual is not formally arrested the inquiry is "how a reasonable man in the suspect's position would have understood his situation." Alward, 112 Nev. at 154 (citing Berkemer v. McCarty, 468 U.S. 420 442 (1984)). Some of the factors in this inquiry are:

> (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.

Alward, 112 Nev. 154-55. *See also*, Taylor v. State, 114 Nev. 1071, 968 P.2d 315 (1998).

An individual who is questioned at a police station is not always in custody for the purpose of a *Miranda* analysis. In Oregon v. Mathiason, 429 U.S. 492 (1977), a suspect voluntarily met a police officer at a state patrol office. The officer informed the suspect that he was involved in the crime being investigated. The suspect made incriminating statements that were used against him at his trial. The statements in question were made without the benefit of a *Miranda* warning. The United States Supreme Court held that the statements were admissible. The Court stated:

> Such a noncustodial situation is not converted into one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. *Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.*

Id., 429 U.S. at 495 (emphasis added). *Accord*, Rowbottom v. State, 105 Nev. 472, 480 (1989). *See also,* Mitchell v. State, 114 Nev. 1417, 971 P.2d 812 (1998), wherein the Nevada Supreme Court found that a prisoner questioned in an unlocked room inside a locked prison library for two hours about a case where he was a suspect was not required to be advised of his *Miranda* rights, and the prisoners statements made during such an interview were admissible at trial.

Both the United States Supreme Court and the Nevada Supreme Court have found that the beliefs of either the suspect or the police officer regarding the issue of custody are not a valid inquiry for the *Miranda* analysis. *See*, Stansbury v. California, 511 U.S. 318, 323 (1994) and State v. Taylor, 114 Nev. 1071, ___, 968 P.2d 315, 323 (1998).

The second query to determine if *Miranda* warnings are required is whether the individual was subject to "interrogation." Interrogation has been defined by the Nevada Supreme Court as "express questioning and other acts designed to elicit incriminating statements." Pendleton v. State, 103 Nev. 95, 99 (1987)(citing Rhode Island v. Innis, 446 U.S. 291 (1980)). To trigger a *Miranda* requirement there must be both custody and interrogation.

The second area of questioning raised by the defendants motions is post *Miranda* questioning. In determining the admissibility of such statements the Court must focus on whether the waiver of rights was voluntary. The Nevada Supreme Court has held:

> In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242 (1960). A confession is involuntary whether coerced by physical intimidation or psychological pressure. Townsend v. Sain, 372 U.S. 289, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963).

Passama v. State, 103 Nev. 212, 213-14 (1987). The Court went on to state:

> To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226-227, 93 S.Ct. 2041, 2047-2048, 36 L.Ed.2d 854 (1973). The question in each case is whether the defendant's will was overborne when he confessed. Id., at 225-26, 93 S.Ct. at 2046-2047. Factors to be considered include: the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep. Id., at 226, 93 S.Ct. at 2047.

Passama, 103 Nev. at 214.

The Nevada Supreme Court has held that an interrogation of four to five hours was not so egregious to overcome a voluntary waiver of rights. Alward, 112 Nev. at 156. In Rowbottom, *supra*, the Court found that a questioning session "in excess of ten hours" was not enough to make the statements elicited involuntary.

The United States Supreme Court has also found that a person suffering from delusions and allegedly hearing voices which compelled him to confess to an unsolved murder could voluntarily waive his *Miranda* rights. Connelly, *supra*. The Connelly Court specifically denied the request to "require sweeping inquiries into the state of mind of a criminal defendant who has confessed. . . ." Id., 479 U.S. at 166-67. The Court also declined to create a "brand new constitutional right--the right of a criminal defendant to confess to his crime only when totally rational and properly motivated. . . ." Id., 479 U.S. at 166.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Statement Custodial Circumstances Subjective Belief

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

A person taken into custody must be advised of his constitutional rights prior to the commencement of any questioning. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). However, an officer's obligation to administer Miranda warnings attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 714 (1977). In determining whether an individual was in custody, a Court must examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Veheler, 463 U.S. 1121, 103 S.Ct. 3517, 3520 (1983) (quoting Mathiason, supra, 97 S.Ct. at 714).

The United States Supreme Court has repeatedly held that the subjective thoughts of the officers (or the suspect) are irrelevant to the equation of whether or not a person is in custody. See, e.g., Stansbury v. California, 114 S.Ct. 1526, 1529 (1994).

In Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612 (1976), the defendant, without being advised of his Miranda rights, made incriminating statements to government agents during an interview. On appeal the defendant argued that, although the interview occurred in a non-custodial setting, his statements should nonetheless be suppressed because the government agents had focused on him as the primary suspect in the case. The United States Supreme Court rejected this argument explaining that it "was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time of the questioning, which required Miranda warnings." Beckwith, Id., 96 S.Ct. at 1616. The Court concluded that the defendant was not entitled to Miranda warnings. "Although the focus

of an investigation may indeed have been on Beckwith at the time of the interview...he hardly found himself in the custodial

situation described by the Miranda court as the basis for its holding." Beckwith, Id., 96 S.Ct. at 1616.

In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), the United States Supreme Court reaffirmed the conclusions it reached in Beckwith. Berkemer concerned the roadside questioning of a motorist detained in a traffic stop. In Berkemer, the high court held that the motorist was not in custody for the purposes of Miranda, even though the traffic officer "apparently decided as soon as [the motorist] stepped out of his car that [the motorist] would be taken into custody and charged with a traffic offense." Berkemer, Id., 104 S.Ct. at 3151. The Court explained that since the officer had never communicated his intention to arrest during his questioning of the motorist, Miranda warnings were not required. This lack of communication of the intention to arrest was crucial according to the court. The court stated that a policeman's unarticulated plan has no bearing on the question of whether a suspect was in custody at a particular time; rather, the court held that the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation. Berkemer, Id., 104 S.Ct. at 3151; see also Stansbury v. California, 114 S.Ct. 1526, 1529 (1994), where the high court reached the same conclusion. In Stansbury, the high court concluded:

> It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of Miranda. See, F. Inbau, J. Reid, and J. Buckley, criminal interrogation and confessions, 232, 236, 297-298 (3rd Edition 1986). The same principle obtains [sic] if an officer's undisclosed assessment is that the person being questioned in not a suspect. In either instance, one cannot expect the person under interrogation to probe the officer's innermost thoughts. Save as they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the Miranda custody inquiry. Stansbury, Id., at pp. 1529-1530.

CONCLUSION

Statement Young Adult Admissibility

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK

District Attorney
Washoe County, Nevada

By_____

DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

In Passama v. State, 103 Nev. 212 (1987), the Nevada Supreme Court adopted the totality of the circumstances test previously announced by the United Supreme Court in Schneckloth v.Bustamonte, 412 U.S. 218 (1973), for determining whether a confession is voluntary.

The Nevada Supreme Court stated:

> To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstance on the will of the defendant. See Schneckloth v. Bustamonte, 412 U.S. 218, 226-227 (1973) The question in each case is whether the defendants' was overborne when he confessed. Id. at 225-226. Factors to be considered include: the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights;

Defendant cites several out-of-state cases for the proposition that a parent should be given the opportunity to consult with a juvenile prior to any questioning by the police and that the parent should be present while any custodial interrogation takes place. For example, defendant cites People v. S.M.D., 864 P.2d 1103 Col. 1994), for the proposition that:

> An adult interested in a juvenile's welfare, generally a parent, must be informed of the child's rights, have an opportunity to consult privately with the child, and be present during custodial interrogation at p. 1107.

S.M.D. involved a juvenile prosecution. By contrast, the defendant in the case at bar is being charged as an adult with murder. NRS 62.040(1) (b) expressly excludes the juvenile court from assuming jurisdiction in any case where the defendant is charged with murder or attempted murder.

The Nevada Supreme Court and the Nevada Legislature have taken very different positions than did the Colorado Supreme Court in S.M.D. In McCurdy v. State, 107 Nev. 275 (1991), the Nevada Supreme Court addressed the issue of whether or not a parent or other guardian of a minor taken into custody for murder needs to be immediately notified of the minor's arrest. The Nevada Supreme Court held that no parental notification was required. The court noted that although NRS 62.170(1) requires immediate parental notification in juvenile cases, said section was inapplicable in a murder prosecution, regardless of the minor's age. The court noted that NRS 62.040 (1) (b) excludes the juvenile court from assuming jurisdiction in any case where a minor is charged with murder or attempted murder. The court further noted that NRS 62.040 (1) (b) excluded appellant from the parental notification requirements of NRS 62.170(1). The court went on to state:

> This is not to say that an underage murder suspect may in all instances be interrogated without notifying his or her parents. Had Warren been an eight or nine-year-old assailant, for example, fundamental fairness and due process would probably have demanded that his parents be notified before police interrogation commenced. We need not worry about this problem here, however. Warren was a young man of almost eighteen, and there is nothing in this record to suggest that Warren should be treated differently from the way that he would have been treated had he already reached his eighteenth birthday. He was not a child in the usual sense of the word and was not reasonably, statutorily or constitutionally entitled to have his parents present as a condition to police interrogation. Warren's first degree murder conviction is affirmed. McCurdy, id. at p. 277.

Many of the cases cited by the defendant are cases where the appellant was initially prosecuted as juvenile but was subsequently certified up to adult status due to efforts of the

State. The State respectfully requests that the instant case should be clearly distinguished from the cases cited by defendant because due to the provisions of NRS 62.040 (1) (b) the defendant was arrested as an adult and was immediately advised that he was being arrested as an adult. The defendant has been prosecuted as an adult from the outset. Indeed, in Nevada the State does not have the option of trying an underage murderer as a juvenile. The State respectfully suggests that when the Nevada Legislature enacted NRS 62.040(1) (b) it obviously intended that underage murderers be treated as adults in all respect.

An examination of some of the Nevada cases cited by the defendant is informative. Defendant cites Marvin v. State, 95 Nev. 836 (1979), for the proposition that: "special efforts should be made.. . to interview the juvenile only in the presence of a parent or guardian." ~ defendant's Motion to Suppress, Points and Authorities, p. 9. However, this general language was simply dicta contained in a footnote to the Opinion. Marvin ~. at p. 839, n. 4. The words omitted by defendant when he quoted said footnote were "especially in the case of young children." The entire sentence actually reads, "Special efforts should be made, especially in the case of young children, to interview the juvenile only in the presence of a parent or guardian." Marvin id. at p. 839, n. 4. The defendant in the case at bar is not a "young child"; he was a sixteen-year-old nearing adulthood. As noted previously, the discussion in Marvin regarding the appellant's

confession was dicta only. The main portion of the opinion dealt solely with the issue of whether or not jurisdiction had been properly transferred from the juvenile court to the district court in the proceeding below. Defendant also cites Quiriconi v. State, 96 Nev. 766 (1980), in support of his position. In Ouiriconi, appellant was arrested as a juvenile for various sex-related crimes. Subsequently, appellant was certified up adult court on several of the charges. Appellant contended that since his confession was elicited while he was a minor and during detention at a juvenile hall it was therefore inadmissible, as a matter of law, in adult criminal proceedings. The Nevada Supreme Court rejected this contention. Quiriconi id. at p. 770. The court held that:

> A juvenile should be advised of his rights and informed of the possibility of an adult trial. But here the nature of the charges and identity of the interrogator reflect the existence of an unquestionably adversary police atmosphere and the suspect is reasonably mature and sophisticated with regard to the nature of the process, resulting statements will be admissible in a criminal trial provided that the record otherwise supports a finding voluntariness. Quiriconi id. at p. 771.

One of the most thorough analysis of the issue of the voluntariness of confessions by minors occurred in People v. Larry, 62 Cal. Rptr. 586 (Cal. 1967). In that case the California Supreme Court held:

> This, then, is the general rule: a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement. (See cases collected in Note, 87 A.L.R.2d 624.) Applying the "totality of circumstances" test of Gallegos, such confessions have been held admissible when made by a minor of the age of fourteen,[9] fifteen, **10** sixteen," seventeen, **12** eighteen, **'~** nineteen,'[4] or twenty.'[5] As the court concluded in State v. Carder (1965) supra, 3 Ohio App.2d 381, 210 N.E.2d 714, 719, after reviewing the facts surrounding the murder

> confession of a 16-year-old youth, "Under this "totality of circumstances,' for his statements to be inadmissible we would have to hold that any self-incrimination of a person under 18 years old is involuntary unless his parents or his attorney are present. We would also have to hold that such minor is not mature enough to make a voluntary confession or waive the presence of his parents or his lawyer during any conversation with the police. *This is not the law.* (Italics added in opinion.) Lara j~. p. 599.

Lara contains a detailed summary of the case law in this area and the rationale behind it. Lara, id. at pp. 596-603.

Defendant has failed to cite a single case which mandates that a minor arrested in Nevada must have the company of a parent or guardian during police questioning. The State respectfully suggests that no such authority exists. More importantly, the State respectfully suggests that any additional procedure safeguards that exist to benefit minors charged with juvenile crimes should not apply where the minor is charged as an adult with murder. The Nevada Legislature expressly chose to remove underage murderers from the jurisdiction of the juvenile court and to place them in adult court in all cases. The State respectfully suggests that part of the legislature's rationale in doing this was that it believed that the crime of murder was so serious that it should be treated as an "adult act" in all cases.

In Nevada, statements by a minor will be admissible in an adult criminal trial "provided that the record otherwise supports this finding of voluntariness." Quiriconi ~. at p.771. As previously discussed, the confession in this case was clearly made in a voluntary fashion using the Schneckloth/Passama totality of the circumstance factors test.

CONCLUSION

Based upon the foregoing, the State respectfully requests that the Motion to Suppress be denied in its entirety and that all statements made by the defendant to law enforcement authorities in this case be admissible into evidence.

CONCLUSION

Statement Juvenile Voluntariness Parental Involvement

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Statements made by a juvenile can be applied to adult criminal proceedings against that same juvenile. Our court stated: "...many state courts have decided that juvenile confessions are admissible in criminal proceedings provided they were obtained in compliance with constitutional standards." Quiriconi v. State, 96 Nev. 766, 771, 616 P.2d 1111, ___ (1980) (citations omitted). These standards include the same due process rights afforded to adults, via the 14th Amendment, to include Miranda warnings. In Re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967). If the requisite waiver has been given by the juvenile suspect, the focus then turns to whether or not the statements were made voluntarily; that burden being upon the State to demonstrate by a preponderance of evidence. Quiriconi, supra, at Nev. 772, P.2d 1114.

There is no requirement by statute or case law requiring a parent to be present during the interview, or even that a parent be advised of an interview occurring for a juvenile's statement to be constitutionally admissible. See generally, Elvik v. State, 114 Nev. Adv. Op. 98, 965 P.2d 281. The absence of a parent during the interview is not a constitutional barrier and further, it is merely one of many factors bearing on voluntariness of the statement.[31] Id, NAO at 5, P.2d at 286. Here, the defendant suggests generally that his statement should be suppressed because he is a minor. There is no authority for

[31] "A juvenile should be advised of his rights and informed of the possibility of an adult trial. But where the nature of the charges and the identity of the interrogator reflect the existence of an unquestionably adversary police atmosphere and the suspect is reasonably mature and sophisticated with regard to the nature of the process, resulting statements will be admissible in a criminal trial provided that the record otherwise supports a finding of voluntariness."

such a position in Nevada. As such, his contention should be summarily rejected. Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983); McKinney v. Sheriff, 93 Nev. 70, 71, 560 P.2d 151, 151, (1977). cf., Lisle v. State, 113 Nev. 679, 690, 941 P.2d 459, 467 (1997).

Voluntariness is to be determined by a totality of the circumstances test. Elvik, supra, NAO at 5, P.2d at 286. Relevant factors include "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." Alward v. State, 112 Nev. 141, 912 P.2d 243 (1996), citing Passama v. State, 103 Nev. 212, 735 P.2d 321 (1987). This test as applied to a juvenile in a criminal proceeding is the same as applied to an adult, however, the scope of the inquiry is somewhat broader.[32] Here, the defendant was just short of the age of majority when he confessed to law enforcement. A seventeen year old has significantly more life experiences than the fourteen year old and therefore better equipped to form a decision on his own rather than perceived persuasion by law enforcement. The questioning concerned an Armed Robbery, an extremely serious offense that carries gravity in the minds of even the most naive. He was orally advised of his constitutional rights under Miranda and signed a written waiver of the same. This waiver included his acknowledgement that his statement could be used against him in an adult criminal proceeding. The single interview was brief in length and it was conducted in an adversarial atmosphere, namely in a detention facility and he was being questioned by two police detectives. The defendant has extensive experience with law enforcement and the juvenile justice system as demonstrated by his extensive record.

Here, there is compelling evidence that the defendant was advised, understood and voluntarily waived his right to not incriminate himself. During the entire interview, none of the concerns

[32] This inquiry includes knowledge of the identity of the interviewer, the maturity of the suspect, experience with the criminal justice system, the location of the questioning, the nature of the charges questioned about. Elvik, supra, NAO at 6,7, P.2d at 287.

stated by our court been impinged upon by the two detectives. As such, the State contends that there is no merit in the allegation of his statements being made involuntarily.

CONCLUSION

Because the defendant voluntarily provided a statement to law enforcement of his own accord, those same statements to law enforcement should not be suppressed. As such, the State requests that this court conduct an evidentiary hearing on the matter and thereafter, so find.

Statement Mental Coercion Voluntariness Full Discussion

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

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_____/

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
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Washoe County, Nevada
By_____
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Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

In the line of *cases* dealing with confessions extracted by beatings and other forms of physical and psychological torture, the United States Supreme Court has held that such statements could not be used to secure a conviction if they were "procured by means revolting to the sense of justice. Miller v. Fenton, 474 U.S. 104, 109, 106 S.Ct. 445, 449 (1985), citing Brown v. Mississippi, 297 U.S. 278, 289, 56 S.Ct. 461, 465 (1936) Such interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. Ibid.

The high court has continued to measure such questions involving the voluntariness of the statements under due process considerations rather than the Fifth Amendment privilege against compulsory self-incrimination. Miller v. Fenton, supra., at 474, U.S. 110, 106 S.Ct. 449; Mincey v. Arizona, 437 U.s. 385, 402, 98 S.Ct. 2408, 2418 (1978); Michigan v. Tucker, 417 U.S. 433, 442, 94 S.Ct. 2357, 2362-2363 (1974)

Thus, we are not here concerned with whether defendant exercised a knowing and intelligent waiver of a Constitutional right such as that provided by the Fifth Amendment, but merely whether her statements to the police were made voluntarily. ~ Michigan v. Tucker, supra, at pp. 443-444. Voluntariness must be examined by viewing

the totality of the circumstances surrounding the statement. Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 1424 (1969).see also, Miller v. Fenton, supra. In dealing with psychological pressures it is clear that in order to be deemed an involuntary statement, the "mental coercion" exerted upon the individual must be such that it causes his/her will to admit, deny or remain silent to be overborne. In addition, the coercion which prevents the exercise of a free will must be the result of state action. Confessions prompted by mental or emotional conditions which prevent the exercise of free will but are not the result of official coercion are admissible. Colorado V. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986) . An involuntary confession means a coerced confession. Arizona v. Fulminante, 499, U.S. ____, 111 S.Ct. 1246 (1990); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274 (1960) . "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law ... mere examination of the confessant's state of mind can never conclude the due process inquiry." Colorado v. Connelly, supra.

Such statements are so untrustworthy and reprehensible to our system of justice that they cannot even be used for impeachment to contradict defendant's testimony at trial. See Mincey v. Arizona, supra.; ~ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) (statements obtained in violation of one's Miranda rights may still be used to impeach).. In Pagan v. Keane, 984 F.2d 61 (2nd Cir. 1993), defendant claimed his confession was coerced due to the fact that he had just been shot by police, had undergone four hours of emergency surgery, lost a large amount of blood and suffered injury to his stomach, pancreas and intestines. Hospital personnel first told police that Pagan was in no condition to talk to them. The officers returned within twenty-four hours of the initial

surgery and were allowed to speak with defendant, who then had numerous tubes and catheters hooked up to him, was required to wear an oxygen mask, had a high fever and was under the influence of morphine.

Defendant's Motion to Suppress at trial was denied and this was later affirmed by the State Appellate Court. On federal habeas the Second Circuit Court of Appeals said, "We cannot conclude that the finding of voluntariness was in error" based in part upon evidence of the officer's testimony that the defendant appeared weakened yet "very alert and able to answer all our questions with no problem."

A leading case in this area is Mincey V. Arizona, supra, in which the United States Supreme Court found defendant's statements to be involuntary. Mincey was recognized by the Court in Pagan v. Keane, supra, but is distinguishable in its facts. When interrogated, Mincey was confined in the intensive care unit having just been shot by police. He was in and out of consciousness (almost to the point of a coma) and encumbered by tubes, needles and a breathing apparatus. His pain was unbearable and he also repeatedly asked that the questioning cease until he could get a lawyer. Many of his answers were incoherent. The Court found him to be "at the complete mercy" of the detective and "unable to escape or resist." /

The Ninth Circuit Court of Appeals in U.S. v. George, 987 F.2d 1428 (1993), also distinguished Mincev v. Arizona, supra, in rendering a de novo finding of voluntariness identical to the lower court's ruling. The court stated,

> quite unlike this case, Mincey was unable to speak ... and had to communicate by writing on pieces of paper. He repeatedly asked that the interrogation be stopped until he could get a lawyer, but the police refused and continued their questioning. Finally, some of Mincey's answers were incoherent and he lost consciousness several times during the interrogation. Thus, the factors that led the Supreme Court to conclude

> that Mincey's 'will was simply overborne' are not present here. 987 F.2d 1431 (citations omitted).
> In U.S. v. George, supra, the suspect was first encountered by police in the hospital emergency room suffering from a heroin overdose. He was questioned nonetheless and his condition did not stabilize until four hours later. However, the Court found his statements to be voluntary and stated,
>
> George was coherent, gave responsive answers to [the officer's] questions, and was able to remember accurately his motel and room number. Although George was undoubtedly in critical condition at the time, his injuries did not render him unconscious or comatose. Finally, nothing in the record suggests that [the officer] sought to take advantage of George's weakened condition: he asked simple questions, kept the interview short, and did not receive any indication from George that he wanted a lawyer before he answered any more questions.

The Court went on to find that George had the capacity to consent to a search of his motel for these same reasons and again found no error in the District Court's ruling regarding voluntariness of consent.

In U.S. v. Lewis, 833 F.2d 1380 (9th Cir. 1987), the Court overturned the lower court's ruling of involuntariness due to the effects of heroin and a hospital-administered general anesthetic. The trial judge had made these statements:

> Now, anybody that has ever been under a general anesthetic following an operation knows that as you come out of a general anesthetic you are not accountable for what you say and do ... So, I cannot find that a person who is both withdrawing from heroin and coming out from under a general anesthetic and is under arrest and confront by FBI agents is in a position to make a voluntary and knowing statement at that time.
> The Court of Appeals reviewed the lower court's findings de novo "under the clearly erroneous standard" and overturned, stating,
>
> Lewis's statements on October 21, 1986, were not incredible nor unresponsive. Instead, her answers demonstrated her capacity to understand what was said to her and to respond truthfully. Our independent review of the record has convinced us that Lewis's October 21, 1986 statement was voluntary.

The court reiterated that the officer's conduct also was not coercive.

In U.S. V. Martin, 781 F.2d 677 (9th Cir. 1985) , the defendant suffered injury in a bomb explosion. He relied on Townsend V. Sam, 372 U.S. 293, 83 S.Ct. 745 (1963) (as does defendant Kent in the instant matter), and Mincey v. Arizona, supra, contending because he was in great pain and under the influence of Demerol, a pain-killing medication, his statements were not the product of his free will and rational choice.

The Court specifically found the facts of both these cases to be inapplicable, stating,

> Martin's injuries, while painful, did not render him unconscious or comatose. Moreover, Martin said that he wanted to talk to the officers and was not reluctant to tell his story.
> The Court also determined that:
> Martin was awake and relatively coherent When Martin became too groggy to understand the detective's questions, Detective Schindler terminated the interview. There is no evidence of extended and oppressive questioning.

Thus, voluntariness is measured in terms of whether the statement "was the product of a free and deliberate choice rather than from intimidation, coercion, or deception." See Collazo v. Estelle, 940 F.2d. 411 (9th Cir. 1991) . This standard requires an uncoerced choice that does not require any requisite level of awareness, intellect or comprehension. Ibid.

The awareness, intellect or comprehension test is reserved for suspects in custody who waived their Miranda rights under the Fifth Amendment. Such a waiver of the important constitutional right requires not only voluntariness but also a knowing and intelligent choice. See Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141 (1986); Collazo v. Estelle, su~ra. Kent clearly is in error when she infers that she must "fully appreciate the significance" of her choice or be exercising comprehension of her statement to be voluntary under the Due Process Clause.

In Moran v. Burbine, supra, the Court indicated that voluntariness of the Miranda waiver was not at issue because there is no suggestion that police resorted to physical or psychological pressure to elicit the statements. Thus, no intimidation, coercion or deception existed and defendant made a 8 free choice. At issue was merely whether Burbine understood and had knowledge of his rights such that he could make an intelligent decision to waive them.

This is a serious flaw in the underpinnings of defendant's argument and why we see such an apparent clash between the very recent case law cited herein and that cited by defendant. For instance, defendant fails to appreciate that her cited case of Reddish v. State, 167 S.2d 858 (Fla. 1964), which notably pre-dates Miranda, involved a murder suspect who was clearly under arrest and had shot himself in the chest prior to questioning. Although the Court acknowledged that, generally a confession obtained while under the influence of narcotics is governed by much the same rule as a confession made under the influence of intoxicating liquors. Ordinarily, the cases indicate that the effect of narcotics relate generally to the credibility to be given the confession, rather than its admissibility. 23 CJS Crim. Law §828, p. 228, it went on to conclude that if Reddish could not "fully appreciate the significance of his admissions," that the confession would not be consistent with [Fifth Amendment] constitutional standards against compelled self-incrimination. Obviously, the Court could not and did not make a voluntariness determination under the Due Process Clause of the Fourteenth Amendment.

Thus, a proper inquiry in this case is whether Kent, due to any deficient mental or physical conditions, was particularly susceptible to police coercion. However, this Court

is not concerned with whether she knowingly or intelligently spoke to police or waived her rights. The voluntariness standard applies equally to both the Fifth and Fourteenth Amendments, however, the knowing and intelligent waiver test is reserved to Fifth Amendment concerns.

In U.S. v. Short, 947 F.2d 1445 (10th Cir. 1991), the defendant was interviewed following a waiver of his Miranda rights. He had been in a serious motorcycle accident nine days before and hospitalized for five days. He was still in numerous casts for broken bones and had 100 facial stitches. He was on doctor-prescribed Percodan and Hydracodeine for pain.~ Defendant claimed he was in a great deal of pain, drowsy, relaxed and would forget where he was. The officers acknowledged he looked like he was in pain "but he never stated he was in an over abundance of pain whatsoever." In addition, defendant was concerned about his eleven-year-old daughter who was being detained in handcuffs for hours and crying. Defendant indicated what was happening to his daughter was "hurting me inside," that she "had nothing to do with it," and his main concern was for her well-being.

Defendant claimed that "the physical pain factor and the taking of drugs should itself eliminate any finding of voluntariness of his statements." He further asserted there could be no question his statements were coerced if his physical condition is considered along with the psychological pressure he suffered because of his daughter.

Defendant brought his claim under the voluntariness prong of the Fifth Amendment - - whether his waiver was coerced. The trial Court, as well as the de novo Appellate Court review, found that defendant's waiver was not only voluntary, but also knowingly made. The Court stated at p. 1450,

> without condoning the detention of defendant's eleven-year-old daughter in handcuffs or the questioning of defendant without inquiry into his ability to respond despite his visible pain,(the record supports admissibility of the statements ... In addition, defendant never told his questioners that he felt too ill, or groggy to answer questions.

Intoxication and fatigue do not automatically render a confession involuntary; rather, the test is whether these mental impairments caused the defendant's will to be overborne. U.S. v. Casal, 915 F.2d 1225 (8th Cir. 1990).

Defendant Was Not In Custody

Custodial interrogation necessitating the rendition of Miranda warnings requires a deprivation of a person's freedom in a significant way. Oregon v. Mathiason, 429 U.S. 492, 494, 97 S.Ct. 711, 713 (1977).

In Oregon v. Mathiason, supra, defendant was a parolee who voluntarily gave an interview to police at the police station upon their request. At the close of the interview, defendant left without hindrance. The Court stated,

It is clear from these facts that Mathiason was not in custody or otherwise deprived of his freedom in any significant way,

even though Mathiason and the officer sat in the confines of a small office with the door closed.

In California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517 (1983), upon virtually identical facts as those found in Oregon v. Mathiason, su~ra, the Court held that a non-custodial situation is not converted into one in which Miranda applies simply because the questioning took place in a coercive environment such as the police station. The police are required to give Miranda warnings only "where there has been such a restriction on a person's freedom as to render him in custody." The Court noted,

> the very practical recognition that any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue

of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.

The Court also acknowledged that Beheler was emotionally distraught and had been drinking, yet reversed a lower court's finding of the custodial status.

The defendant in U.S. v. Martin, supra, was also deemed not to be in custody even though he was in severe pain from the bomb blast and under the influence of Demerol.

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Unlike the facts in Mathiason and Beheler, Kent was not even a suspect to a known crime at the time of the interview. As such, police were not even interrogating. ~. Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980) . Both prongs of Miranda's "custodial interrogation" must be met before Miranda warnings are triggered.

Statement Post Miranda Waiver Express

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Defendant contends that he did not waive his right to remain silent and therefore his statement must be suppressed! At the hearing it will be determined whether or not expressly waived his rights following the Miranada admonition by Detective .

Assuming, arguendo, that did not expressly waive his rights, his subsequent statements are nonetheless clearly admissible.

It is well settled that an express statement by a suspect that he is formerly waiving his constitutional rights is not necessary to support a finding that he in fact waived his rights. A waiver of rights may be implied from the suspect's subsequent conduct, including answering the questions posed.

In North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979), the United State Supreme Court held that a formal, express waiver by the suspect is not required. Rather, the question of waiver must be determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Butler, id. 441 U.S. at pp. 374-375, citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023; United States v. Washington, 431 U.S. 181, 188, 97 S.Ct. 1814, 1819; Schneckloth v. Bustamonte, 412, U.S. 218, 93 S.Ct. 2041; Frazier v. Cup, 394 U.S. 731, 739, 89 S.Ct. 1420, 1424.

In Butler, the Supreme Court noted that ten of the eleven United States Court of Appeals, as well as the courts of at least seventeen states, had previously held that an express waiver by the suspect

was not necessary to support a finding that the suspect in fact waived his right to remain silent or his right to counsel. Butler, id., 441 U.S. at pp. 375-376.

Numerous other decisions have held that an express waiver is not required and that waiver may be implied from the defendant's conduct, including answering the police officers questions. See, e.g., U.S. v. Riley, 653 Fed.2d 1153, 1162, (7th Circuit 1981); People v. Hindmarsh, 185 Cal.App. 334, 344-345 (1986) (applying Butler to juvenile cases); People v. Sully, 53 Cal.3d 1195, 1233 (1991) (implied waiver okay in death penalty case); People v. Johnson, 70 Cal.2d 541, 558 (1969); People v. Davis, 29 Cal.3d 814, 824 (1981); People v. Cooper, 10 Cal.App.3d 96, 107-108 (1970); People v. Mitchel, 132 Cal.App.3d 389, 406 (1982); People v. Boyette, 201 Cal.App.3d 1527, 1535 (1988); U.S. v. Merano-Lopez, 466 Fed.2d 1205, 1206 (9th Circuit 1972); U.S. v. Basile, 569 Fed.2d 1053, 1056-1057 (9th Circuit 1979) (all approving implied waivers).

At the time of the interview Ryan Hadley was no child. He was a sophisticated young gang member who had been through the system before. See Butler, supra. He had previously been imprisoned, together with Fernando Jiminez, by the California Youth Authority.

Statement Miranda Voluntariness Totality of the Circumstances

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By_____
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POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The United States Supreme Court in the case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) held:

> The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers **after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way**. Id. 86 Supreme Court 1612. (Emphasis added)

Since the Miranda decision was handed down, many other courts have interpreted the meaning of "in custody" under a number of different factual scenarios. The United States Court of Appeals for the 9th Circuit held, in Williams v. United States, 381 F.2d 20 (C.A. 9 1967), that even though officers had entertained an unexpressed intention to detain the defendants if they had heightened the officers suspicion by refusing to answer questions or attempting to flee, this unexpressed intent was insufficient to amount to a formal detention. Id. at 22.

In United States v. Giacalone, 508, F.Supp. 39 (S.D.N.Y. 1980) the Federal District Court held that Joey Arano was not "in custody" for purposes of Miranda when he was questioned at his home, even though the FBI agents had in their possession a warrant for his arrest. The Court so held even though the agents may have indicated to Arano that they believed him to be the person named in the warrant and threatened him with a few nights in jail if he did not cooperate. Id. The Court, in Giacalone, relied upon the Supreme Court case of Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1997), to support their holding that Joey was not entitled to Miranda Warnings even though the FBI agents held a valid warrant for his arrest. Id.

In Mathiason, the United States Supreme Court found that appellants pre-Miranda statement was admissible even though the lower court had found that the "interrogation took place in a "coercive environment." In that case, the appellant had been suspected of committing a burglary of a residence near Pendleton, Oregon. The police officer left a note at the residence of the defendant stating that he wished to discuss something with the defendant. When the defendant called and spoke with the officer he agreed to meet him at the police station. The interview took place in the patrol office approximately two blocks from the defendant's house. The defendant was told he was not under arrest and the door to the office was closed. The defendant was told that the officer wanted to talk to him about a burglary and that his truthfulness would possibly considered by the prosecuting attorney. The officer further informed the defendant, falsely, that his fingerprints had been found at the scene of the crime. The defendant then confessed after a few minutes and was thereafter Mirandized where upon he proceeded to give a tapped confession. Id. at 429 U.S. 493, 494. The defendant was then allowed to leave the station after being told the case would be submitted to the district attorney to determine whether criminal charges would be brought. In reversing dismissal of the case, the U.S. Supreme Court stated:

> But police officers are not required to whom administer Miranda Warnings to everyone they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda Warnings are required only where there has been a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable and to which it is limited.

Oregon v. Mathiason, 97 S.Ct. at 714.

Likewise, the United States Supreme Court in Berkemer v. McCardy, 468 U.S. 420, 104 S.Ct. 3138, 82 2d 317 (1984), held that even though an officer had subjectively concluded that a suspect would be arrested after observing indications that the suspect was driving under the influence of drugs and/or alcohol the pre-arrest statements of the defendant that he had ingested marijuana were admissible.

The United States Supreme Court also found that a defendant was not "in custody" for Miranda purposes even though he made incriminating statements to an undercover officer while

incarcerated on other charges. See Illinois v. Perkins, 46 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243, (1990).

Another case addressing the issue of whether there was a formal arrest or restraint on freedom of movement to a degree associated with formal arrest, is Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293, (1994). In Stansbury, the defendant was suspected of kidnapping and murdering ten year old, Robyn Jackson, on September 28, 1982. The following morning a witness by the name of Andrew Zimmerman observed a large man emerge from a turquoise American sedan and throw something into a nearby flood control channel. Upon further investigation it was determined that the girl's body had been thrown into the channel and there was evidence that she had been raped and murdered. The police officers had information that ROBYN had talked to ice cream truck drivers, one being Robert Edward Stansbury, just before her disappearance. The police were able to locate the trailer where Stansbury lived and four officers responded to Stansbury's residence at approximately 11 o'clock at night. The officers knocked on the door and when Stansbury answered, he was told that the officers were investigating a homicide and that Stansbury was a possible witness to the homicide. Stansbury was asked if he would accompany the officers to the police station to answer some questions. Stansbury agreed to the interview and accepted a ride to the station in the front seat of Officer Lee's police car. While at the police station, Lt. Johnston, in the presence of another officer questioned Stansbury about his whereabouts and activities during the afternoon and evening of September 28th, the date Robyn was abducted. No Miranda Warnings were given to the defendant prior to questioning. During the interrogation, the defendant revealed that he had borrowed his house mates turquoise American sedan when he left the trailer at about midnight on September 28th. After the defendant had admitted that he had prior convictions for rape, kidnapping and child molestation, the interview was terminated and another officer advised Stansubyr of his Miranda rights. Stansbury then refused to make further statements and requested an attorney.

Stansbury filed a pre-trial motion to suppress all of the statements made at the station and the evidence recovered as a result of those statements. The Supreme Court in reviewing the "totality of the circumstances", determined that the defendant was not in custody so as to render his statements to the police in violation of Miranda. Id. In upholding the conviction of Stansbury, the Supreme Court stated:

> Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Id. 114 S.Ct. at 1529. (Citations omitted)

He was not handcuffed nor was there any restraint of his movement while at the police station prior to his arrest. In conclusion, even if the officers had prior knowledge of the existence if the outstanding warrant for the arrest of Morris, this factor alone does not render a person "in custody" for purposes of Miranda. United States v. Giacalone, 508, F.Supp. 39 (S.D.N.Y. 1980). Under the facts of this case, when viewed objectively, a reasonable person would not be lead to believe that his freedom of movement was restrained to a degree so as to render him "in custody."

A suspects' or the polices' subjective view of the circumstances does not determine whether the suspect is in custody. State v. Taylor, _____ Nev. _____, 114 Nev. Ad. Op. 118, 968 P.2d 315 (1998); citing Stansbury v. California. Considering the "totality of the circumstances", the defendant's pre-Miranda statement is admissible regardless of the officers intent or the existence of an arrest warrant.

II. MORRIS DID NOT INVOKE HIS MIRANDA RIGHTS AFTER THEY WERE READ TO HIM, AND THE DIALOG THAT FOLLOWED IS ADMISSIBLE AND NOT AN IMPROPER INITIATION OF INTERROGATION.

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). To invoke his right to counsel set forth in Miranda, a "suspect must **unambiguously** request counsel." Davis v. United States, 512 U.S. 452, 459 (1994) (emphasis added).

The Ninth Circuit relied on Davis to address the specific issue of waiving one's right to remain silent. In Evans v. Demosthenes, 98 F.3d 1174 (9th Cir. 1996), Evans was arrested and read his Miranda rights. The officer questioned Evans for about five minutes, but Evans complained of stomach pain and appeared to be in physical distress. The officer left Evans for fifteen to twenty minutes before returning and questioning Evans further. Evans was not reminded of his rights at that time and he confessed. The court found that, "Evans was not communicating any desire to remain silent; he was communicating his experience of pain...Evans did not remain silent and neither by what he said nor how he acted did he indicate he wanted to invoke his right to remain silent." Id. The court concluded that "Evans did not invoke his right to remain silent, he voluntarily waived that right when he spoke with Officer Burns, and his confession was voluntary, knowing, and intelligent." Id., at p. 1177.

A suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Oregon v. Elstad, 470 U.S. 298, 318 (1985). See, Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997). The only determination to be made is whether the statements following the Miranda warning are voluntary. Elstad, supra, at p. 318. This court has previously found Morris' statements voluntary. Therefore, Morris' statements, both before and after Miranda warnings, are admissible before the jury.

"[T]he validity of a defendant's waiver of his Fifth Amendment rights after receiving Miranda warnings must be determined in each case by examining the facts and circumstances of the case such as the background, conduct, and experience of the defendant." Falcon v. State, 110 Nev. 530, 534, 874 P.2d 772 (1994).

> [M]iranda holds that [t]he defendant may waive effectuation of the rights conveyed in the warnings provided the waiver is made voluntarily, knowingly and intelligently... The inquiry has two distinct dimensions... First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986). "The State must prove by a preponderance of the evidence that the defendant knowingly and intelligently waived his Fifth Amendment rights." Falcon, supra, at p. 534.

A waiver of Miranda rights need not be explicit as long as the surrounding circumstances indicate an intelligent and voluntary choice. North Carolina v. Butler, 441 U.S. 369, 373 (1979); United States v. Andaverde, 64 F.3d 1305, 1313 (9th Cir. 1995). A valid waiver of Miranda was found where there was a "recitation of the rights in English and supervision of the reading in Spanish, accompanied by the officer's confirming that [the suspect] understood his rights." United States v. Cazares, 112 F.3d 1391, 1394 (9th Cir. 1997).

Statement Voluntariness Defendant's Burden

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
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By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

WHETHER A DEFENDANT SEEKING SUPPRESSION OF A STATEMENT BEARS ANY BURDEN IN MAKING SPECIFIC ALLEGATIONS TO ESTABLISH THE UNCONSTITUTIONALITY OF SAID STATEMENT

REQUIREMENT THAT A DEFENDANT HAS SOME BURDEN TO ARTICULATE THE BASIS FOR SUPPRESSION OF A STATEMENT

The precise question to be briefed before this Court is whether a criminal defendant has some slight burden to specifically allege the claimed defect that renders the defendant's statement to police inadmissible at trial. As previously indicated in Court, the State certainly understands the law in the State of Nevada regarding the State's burden of showing a confession/admission to be voluntarily given, however, that burden can only properly be triggered when a specific allegation has been made that would give proper notice to the State as to what police conduct was inappropriate and/or why the defendant's state of mind would cause the statement to be involuntary.

Title 4 of the Nevada Revised Statutes deals generally with witnesses and, more importantly, the rules of evidence.

NRS 47.030 sets forth the purposes of Title 4 of the Nevada Revised Statutes. It states in its entirety: The purposes of this "Title" are to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

In the context of a habeas corpus proceeding, the Fifth Circuit Court of Appeals has held:

> Before a prisoner is entitled to a hearing on the voluntariness of his confession the petitioner must 'show that his version of the events, if true, would require the conclusion that his confession was involuntary.' Martinez v. Estelle, 612 F.2d 173, 180 (5th Cir. 1980) citing to Procunier v. Atchley, 400 U.S. 446, 451, 91 S.Ct. 485, 488 (1971). See also United State v. Davidson, 768 F.2d 1266 (11th Cir. 1985). The defendant has not presented any competing version of the facts either at

> his trial or on appeal, much less any facts from which involuntariness of the confession could be inferred.

United States v. Espinoza-Seanez, 862 F.2d 526, 536 (5th Cir. 1988) (emphasis added).

The Nevada Supreme Court is in accord. Specifically, in Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), our Court held that "bare" or "naked" claims for relief that are unsupported by specific factual allegations would not be the basis for appellate relief, to include, an otherwise undeniable right to an evidentiary hearing.

Additionally, a compelling analogy can be drawn in reviewing case law regarding a Franks hearing, a hearing designed to traverse the imperfections of a search warrant. Among the requirements to establish a sufficient motion for a Franks hearing is that the defendant must allege specifically which portion of the warrant affidavit are claimed to be false and/or misleading. See United States v. DiCesari, 765 F.2d 890, 894 (9th Cir. 1985). See also Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990); Garrettson v. State, 104 Nev. _____, 967 P.2d 428 (1998).

As the aforementioned authority clearly points out, the evidentiary burden of the State is not in dispute. More precisely, it is whether the State is put on notice of the alleged defect so that it may properly meet its burden. As this case unequivocally points out, the precise nature of the alleged defect is not self-evident. Further, the State is at an extreme disadvantage in attempting to meet its burden when it has no notice as to what the alleged defect is. Here, the defendant has apparently alleged that he was so grossly intoxicated he could not voluntarily and intelligently waive his Miranda rights. That allegation could potentially involve a separate and distinct assessment on behalf of the State on how to meet its evidentiary burden at a suppression hearing. The burden on the defendant to allege with specificity is slight, if it's a burden at all. The State is incapable of assessing those defects that may exist in a defendant's state of mind (i.e. drunkenness, use of controlled substance). Further, the State is incapable of assessing whether or not someone's alcohol or drug consumption, in and of itself, or combined with other factors, rendered the defendant incapable of intelligently waiving one's Miranda rights. Obviously, the State would be able to ascertain whether the Miranda warnings were given in a case and thus, could infer that was a defect without the specific allegation being made in the defendant's motion. NRS 47.030 speaks of

evidentiary issues that are to "secure fairness in administration, elimination of unjustifiable expense and delay." Failure of the defendant of having the minimal burden of stating what renders a defendant's statements inadmissible directly focuses and properly gives notice to the State to meet its evidentiary burden.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
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Washoe County, Nevada

By_____

Deputy District Attorney

Statement Voluntariness Miranda Discussion

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Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

DEFENDANT'S STATEMENTS WERE VOLUNTARY

In order to be admissible at trial as substantive evidence or even for impeachment, a defendant's pre-trial statements must be determined to have been voluntarily made. See, Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964); Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978). The State is required to prove voluntariness by a preponderance of the evidence based upon the totality of the circumstances. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972); Brimmage v. State, 92 Nev. 434 (1977).

Plaintiff is aware of absolutely no legal basis upon which defendant could be claiming his statements were involuntary. Certainly no coercion or trickery could be claimed. No promises of leniency or other promises or threats were made to him to induce him to give any of the statements. Defendant was not injured or under the influence of drugs or alcohol. In sum, defendant was not compelled in any way to make these statements. If he felt forced to do so or uncomfortable in any way, all he had to do is say "goodbye" and hang up the phone. Cf., Alward v. State, 112 Nev. 141 (1996); Passama v. State, 103 Nev. 212 (1987).

In order to be voluntary, a statement simply must be the product of a rational intellect and free will. Rowbotton v. State, 105 Nev. 472, 482 (1989). Sandoval cannot possibly make a plausible argument that his will was overborne.

MIRANDA RIGHTS WERE NOT REQUIRED

It is well settled that recitation of the Miranda warnings and a waiver of Fifth Amendment rights are only required when a person is in custody and being interrogated by law enforcement officials. As stated in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), "By custodial interrogation, we mean questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis added).

It would be impossible to suggest that defendant was deprived of his freedom in a telephone conversation. The test for Miranda custody is how a reasonable person in the suspect's position would have understood his situation based upon the totality of the circumstances. Critical factors would include where the interrogation takes place, whether objective indicia of arrest are present, as well as the length and form of questioning. See Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984); Alward v. State, supra.

Although the fact that the investigation is focused upon the individual questioned can be a factor in this totality of circumstances, police officers are not required to administer Miranda warnings to everyone they suspect of a crime. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711 (1977). The critical question is, "was the person in a custodial setting?"

In Beckwith v. U.S., 425 U.S. 341, 96 S.Ct. 1612 (1976), it was conceded that Beckwith was the focus of a criminal IRS investigation, but primarily because he was interrogated at his home rather than the police station, the high court determined that no Miranda warnings were required.

Rarely will Miranda rights be required even during investigative detentions. Peace officers are permitted to question a suspect about the circumstances of a crime. See, NRS 171.123(3); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). Miranda is limited to those situations in which there has been such a restriction on a person's freedom as to render him "in custody", not merely a temporary detention for investigation. See, Oregon v. Mathiason, supra, at 429 U.S. 495.

In U.S. v. Bautista, 684 F.2d 1286 (9th Cir. 1982), two suspects were detained for investigation of bank robbery. Both were frisked and handcuffed for officer safety, but were not placed under arrest before being interrogated by officers. No Miranda warnings were given. The admission of the suspects' statements was upheld by the Ninth Circuit Court of Appeals. The Court, citing Oregon v. Mathiason, supra, stated that detentions, "though inherently somewhat coercive, do not usually involve the type of police dominated or compelling atmosphere which necessitates Miranda warnings. At page 1291.

There is absolutely nothing improper with the police even purposely attempting to elicit incriminating evidence in a non-custodial interview without first advising a suspect of his Miranda rights. See, Minnesota v. Murphy, 485 U.S. 420, 104 S.Ct. 1136 (1984).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Statute Interpretation Plain Meaning

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION
FOR ADDITIONAL
PEREMPTORY CHALLENGES

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 175.051 SHOULD BE INTERPRETED BY ITS PLAIN AND ORDINARY MEANING

"It is well settled in Nevada that words in a statute should be given their plain meanings unless this violates the spirit of the act." McKay v. BD. of Supervisors, 102 Nev. 644, 648 730 P.2d 438, 441 (1986). NRS 175.051(1) states:

> If the offense charged is punishable by death or by imprisonment for life, each side is entitled to eight peremptory challenges.

The instant motion claims that the language in NRS 175.051(1) does not "limit" each side to eight peremptory challenges, thus, the argument is made that this court has discretion to permit in excess of eight peremptory challenges. The plain language of the statute is in opposite of this interpretation. "When interpreting a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, against what is unreasonable." Desert Valley Water CO. v. State Engineer, 104 Nev. 718, 766, P.2d 886 (1988).

A peremptory challenge was created by statute in its design to facilitate the seating of jury that will listen without bias to the evidence to do justice to both parties. State v. Baker, 935 P.2d 503 (Utah 1997). The peremptory challenge is not constitutionally based either under the federal constitution or under Nevada's constitution. "Neither the United States constitution nor the Utah constitution provides a right to a certain number of peremptory challenges, or indeed to any at all." State v Baker, 935 P.2d 503, 505 (Utah 1997). See also State v. Menzies, 889 P.2d 393, 398 (Utah 1994). Further, the United State Supreme Court in addressing a similar issue has held that loss of a peremptory challenge is not remedied by an automatic reversal of the jury's verdict. Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278 (1988) (loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury).

"If the language [of a statute] is capable of two constructions, one of which is consistent ... with the evident object of the legislature in passing the law, that construction must be adopted which harmonizes with the intention." Recanzone v. Nevada Tax Commission, 92 Nev. 302, 305, 550 P.2d 401, 403 (1976). The plain interpretation of NRS 175.051(1) contemplates each side in a capital case at eight peremptory challenges. There is nothing in the language in that statute that would indicate an intent to grant additional peremptory challenges to either side.

The Ninth Circuit Court of Appeals has held that the constitution does not require a particular number of peremptory challenges, merely that the number allotted shall be available to the defendant. In Hines v. Enomoto, 658 F.2d 667 (9th Cir. 1981) the court held "[w]e do not hold that the constitution requires the states to afford criminal defendants a particular number of peremptory challenges, nor that it requires them to adopt any particular procedure to implement the exercise of peremptory challenges." Id. at 672. There being no constitutional right to a certain number of peremptory challenges in a capital case, the articulated number of eight set forth in NRS 175.051(1) is properly interpreted at its common place meaning.

CONCLUSION

There is no constitutional right, either pursuant to the federal or state constitution, the peremptory challenges. Further, the plain language of the statute is to be given its ordinary meaning if no ambiguity exists. NRS 175.051(1) is plain on its face, to wit, each side is entitled to eight peremptory challenges. The constitution does not require a certain number of peremptory challenges in any type of criminal case.

Therefore, the plain meaning of NRS 175.051(1) should be given and each side permitted to use no more than eight peremptory challenges in the voir dire process in this case.

Dated this _____ day of _____, .

_____

RICHARD A. GAMMICK
District Attorney

_____

Deputy District Attorney

Statute of Limitations Secret Offense

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

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III. ARGUMENT

Defendant's motion fails to cite the controlling statutory law. NRS 171.095 provides that:

> 1. Except as otherwise provided in subsection 2 and NRS 171.083:
>
> (a) If a felony, gross misdemeanor, or misdemeanor is committed in a secret manner, an indictment for the offense must be found, or an information or complaint filed, within the period of limitation prescribed in NRS 171.085 and 171.090 **after the discovery of the offense** unless a longer period is allowed by paragraph (b).
>
> (b) An indictment must be found, or an information or complaint filed, **for any offense constituting sexual abuse of a child, as defined in NRS 432B.100, before the victim of the sexual abuse is:**
>
> **(1) twenty-one years old if he discovers or reasonably should have discovered that he was a victim of the sexual abuse by the date on which he reaches that age**; or
>
> (2) twenty-eight years old if he does not discover and reasonably should not have discovered that he was the victim of the sexual abuse by the date on which he reaches twenty-one years of age.

The Nevada Legislature adopted the statute in direct response to the reality that children often wait years to tell the authorities that they have been sexually abused. The Nevada Supreme Court has expressly recognized this reality. See Walstrom v. State, 104 Nev. 51 (1988), at pp. 55-56, and footnote 8 thereto. The Nevada Legislature did not attempt to further define what the terms of "secret manner" and "discovery" mean, leaving it to the trial court to determine as a question of fact. The applicable Nevada cases make clear that an offense may be committed in a secret manner when it is committed in private by an adult defendant upon a child with no other witnesses present. Indeed, most of the cases where the Supreme Court has found that an offense was committed in a secret manner involve lewd acts committed by adult defendants on child victims, as in the present case. See e.g., Walstrom v. State, 104 Nev. 51 (1988); Hubbard v. State, 110 Nev. 671 (1994); Houtz v. State, 111 Nev. 457 (1995).

Thus, the initiation of the prosecution was clearly timely pursuant to NRS 171.095(1)(a).

The timeliness of the initiation of the prosecution is even clearer pursuant to NRS 171.095(1)(b), quoted in full supra. Under that section a complaint for any offense constituting sexual abuse of a child, as defined in NRS 432B.100, can be filed at any time until the victim reaches twenty-one years of age, **even if the offense was not committed in secret.** NRS 432B.100 includes lewdness with a child under the age of fourteen years and under the definition of "sexual abuse." Therefore, as to the lewdness counts (I & II) the initiation of the instant prosecution is clearly timely under NRS 171.095(1)(b).

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
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By_____
Deputy District Attorney

Sufficiency of the Evidence Grand Jury

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE EVIDENCE PRESENTED TO THE GRAND JURY ESTABLISHES PROBABLE CAUSE THAT PETITIONERS COMMITTED THE CHARGED OFFENSES.

It is well settled that the District Court's function in reviewing a pretrial writ of habeas corpus challenging the sufficiency of probable cause is to determine whether enough competent evidence was presented to the Grand Jury to establish a reasonable inference that the accused committed the offense(s). State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962). This probable cause standard may be met by the presentation of slight, even marginal, evidence. State v. Boueri, 99 Nev. 790, 795, 672 P.2d 33 (1983). Further, the State is not required to negate the inferences which may tend to explain the conduct of the accused. Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340 (1971).

The legal efficacy of an indictment will be sustained if there has been presented to the Grand Jury the slightest sufficient legal evidence in the best degree, even though inadvertent evidence may also have been adduced. Robertson v. State, 84 Nev. 559, 561, 445 P.2d 352 (1968). Respondent maintains that all testimony evoked by the State in its presentation to the Grand Jury was competent legal evidence. However, assuming arguendo that petitioners were successful in excluding what they claim was inadmissible evidence, there can be no serious question that the Grand Jury transcript still contains ample facts to satisfy NRS 172.155, as interpreted by the aforementioned cases.

NRS 50.265 provides that even a lay witness can relate his opinions or inferences which are rationally based upon his perception and helpful in the determination of a fact in issue. An expert witness may give an opinion or inference upon an ultimate issue to be decided by a trier of fact and may base this opinion or inference upon facts or data which are not otherwise admissible in evidence. See NRS 50.285 and NRS 0.295.

MRS 50.275 authorizes a witness qualified as an expert by special knowledge, skill, experience, training or education to utilize this specialized knowledge when testifying to matters which will assist the trier of fact in understanding the evidence or in determining a fact in issue. In Watson v. State, 94

Nev. 261, 578 P.2d 253 (1978), a police officer's testimony that channel locks are often used by burglars, and that burglars may use socks as gloves to prevent fingerprint impressions was upheld as admissible, expert opinion. The Court determined the evidence was helpful to the trial jury in indicating the possible modus operandi of the burglary. See also, Smith v. State, 100 Nev. 570, 688 P.2d 326 (1984).

In the instant case, gaming control agents were properly qualified as expert witnesses based upon their training, education, knowledge and experience in the field of gaming. Proper expert and non—expert opinions or inferences were rendered by each, and the Grand Jurors were entitled to give whatever credibility they wished to the statements.
Hardison v. State, 84 Nev. 125, 437 P.2d 868 (1968); State v. Johnson, 536 P.2d 295 (Idaho 1975).

Since guilt or innocence is not in issue at Grand Jury proceedings, the District Court review of the transcript does not involve weighing conflicts or disagreements with the testimony. The probable cause finding is satisfied if, from all the evidence, a logical inference can be made that the accused committed the offense(s). State v. Boueri, supra, at page 795..

A. THE GRAND JURY RECEIVED ONLY THE BEST EVIDENCE IN DEGREE.

NRS 172.135(2) states:

> The Grand Jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Petitioners contend that the State permitted hearsay and secondary evidence to be presented in lieu of the "best evidence" by permitting gaming agents to testify to what they observed in watching the video tape. The "best evidence" language of MRS 172.135(2) evolves from the Best Evidence Rule of law which is well recognized as being confined to documentary evidence. Lightford v. Sheriff, 88 Nev. 403, 404, 498 P.2d 1323 (1972). When material terms of the writing are in issue, the rule prohibits the use of parol evidence in lieu of the writing.

This is clearly not applicable to the present situation. The Nevada Supreme Court has repeatedly refused to extend the rule to Grand Jury situations involving alternative methods of proof which are not intended to prove the specific terms of a written document. See Lightford V. Sheriff, supra; Zampanti v. Sheriff, 86 Nev. 651, 653, 473 P.2d 386 (1970) (at Grand Jury proceedings, police officer's opinion testimony identifying marijuana is permitted in lieu of analysis by a qualified chemist).

Suppression Hearing Necessity for Live Testimony

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

NECESSITY OF LIVE TESTIMONY AT A SUPPRESSION HEARING

The issue directed by this Court to be briefed is whether a criminal defendant who seeks suppression of his statements/admissions to police, mandates a evidentiary hearing which can only be satisfied by the presentation of "live" testimony.

NRS 47.090 refers to "hearings" on the admissibility of confessions or statements by a criminal defendant. No statutory provision requires the State to satisfy its burden by calling witnesses. The burden of proving a waiver of one's Miranda rights is that of a preponderance of evidence. Koza v. State, 102 Nev. 181, 188, 718 P.2d 671, 676 (1986).[33] The State is unable to find any authority that directs and/or

[33] Cited affirmatively in the defendant's initial Motion to Suppress p.4, l.22.

mandates that the State can only meet its evidentiary burden by calling live witnesses. The only authority that would address such issue as to whether or not the evidence is otherwise competent.

As previously indicated to this Court, the Preliminary Hearing Transcript regarding the State's assessment in meeting its burden has been addressed by competent evidence. The testimony of the interviewing detective of the defendant was subject to cross examination and the issue of voluntariness was relevant at the time that the testimony was given at the preliminary hearing in this matter. In fact, all the issues that would speak to the issue of an admissible admission/confession were present during the preliminary hearing and the elicitation of the testimony by Detective Ballew. Further, and it is critical to note, that the State's proper evidentiary objection at the preliminary hearing regarding what the defendant stated his level of consumption of alcohol is the same as would be at the hearing in District Court. Statement's made by a defendant against his penal interest require an aspect of unavailability which is certainly satisfied when the State seeks to admit statements of a criminal defendant. See NRS 51.345. The extent of which the defendant stated to the detectives that he consumed alcohol is self-serving and the State would be unable to cross examine the veracity of such claims. The Justice of the Peace properly sustained the State's objection to questions along those lines. From an evidentiary perspective, that is the same evidentiary ruling that should exist in this case. Thus, the only testimony that can properly address the amount and effect of alcohol on the defendant would be the defendant's testimony itself. That is precisely why there is an evidentiary protection provision of NRS 47.090 which prohibits the use of the testimony of the defendant at a suppression hearing to be used against him at trial.

Thus, the State can properly meet its burden of preponderance of the evidence by any means that would utilize competent evidence. No authority exists for the proposition as defense counsel stated it, that live testimony is mandated in a suppression hearing.

It is well settled that failure to either document or cite authority for contentions is grounds to summarily reject a motion. McKinney v. Sheriff, 93 Nev. 70, 560 P.2d 151, (1977); Wilson v. Olausen, 99 Nev. 362, 664, P.2d 328 (1983); Lisle v. State, 113 Nev. 540 (1997).

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____

Deputy District Attorney

Terry Pat Search

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

CASE NO.

v.

COURT

,

Defendant.
_____/

OPPOSITION TO MOTION TO SUPPRESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, and , Deputy District Attorney, and files this OPPOSITION TO MOTION TO SUPPRESS (hereinafter, "Opposition"). The Opposition is pursuant to the United States Constitution, the Nevada Constitution, NRS 171.123, Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526 (1994), Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517 (1983), Oregon v. Mathiason, 429 U.S. 492, 94 S.Ct. 711 (1977), Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972), Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), Miranda v. Arizona, 384 U.S. 436, 85 S.Ct. 1602 (1966), State v. Sonnenfeld, 114 Nev.Adv.Op 73 (1998), State v. Burkholder, 112 Nev. 535 (1996), Gamma v. State, 112 Nev. 833 (1996), State v. Wright, 104 Nev. 521 (1988), Carlisle v. State, 98 Nev. 128 (1982), Rusling v. State, 96 Nev. 773

(1980), Stuart v. State, 94 Nev. 721 (1978), the Points and Authorities attached hereto and incorporated herein by this reference, all the pleadings, papers and authorities on file with this Court in this action, the testimony to be presented on February 17, 1999, at the hearing on this motion, and any oral argument the Court requires.

Dated this ___ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By:_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

The defendant's motion raises two main issues. Issue "A" addresses the evidence collected during the contact between the police and the defendant. Issue "B" addresses statements made by the defendant during that contact. The State will address the issues in the order presented.

A. ALL OF THE PHYSICAL EVIDENCE SEIZED SHOULD BE SUPPRESSED BECAUSE THE EVIDENCE WAS SEIZED THROUGH UNLAWFUL SEARCH OF DEFENDANT'S PERSON.

The defendant's motion appears to make the broad assertion that all the contact between the defendant and law enforcement during the incident in question was unconstitutional. Clearly, such an assertion is untenable. The initial contact between the defendant and law enforcement was nothing more than a consensual contact between the parties. The Nevada Supreme Court has addressed such a situation in State v.Burkholder, 112 Nev. 535 (1996). In Burkholder RPD officers observed Burkholder conducting himself in a manner consistent with the actions of a drug dealer or user. The officers approached Burkholder and identified themselves. The officers ". . .asked Burkholder if he would answer a few questions. Burkholder replied 'yes'." Burkholder, 112 Nev. at 537. Burkholder also answered the basic questions put to him without a *Miranda* warning. Id.

In analyzing the situation the Nevada Supreme Court first acknowledges Terry v. Ohio, 392 U.S. 1 (1968), and its progeny. The Court then states, "[m]ere police questioning does not constitute a seizure. Florida v. Bostick, 501 U.S. 429, 434 (1991)." Burkholder, 112 Nev. at 538. The Court goes on to state:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Burkholder, 112 Nev. at 538-39 (quoting Florida v. Royer, 460 U.S. 491, 497 (1983)).

The inescapable conclusion, based on Burkholder, is that the initial contact between the defendant and law enforcement was nothing more than consensual questioning. Any allegation that the law enforcement were in a place they were not allowed to be, or illegally detaining the defendant initially is simply not based on the facts presented.

The defendant's motion claims that the contact was a violation of his Fourth Amendment rights as outlined in Terry, *supra.* Again, the claim is not supported by federal law or the law in Nevada. The defendant's claims in this area are nothing more than a shortsighted glance at a broad issue. When the facts are applied to the law it becomes obvious that the officers did not violate the defendant's rights.

The Nevada Supreme Court has long followed the ruling announced in Terry. There is a two-prong test to determine whether an investigative detention passes constitutional muster:

> [In] determining whether the seizure and search were "reasonable" our inquiry is a dual one--whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

State v. Sonnenfeld, 114 Nev.Adv.Op 73 (1998)(quoting Terry, 592 U.S. at 19-20). The Nevada Legislature has codified this seminal area of constitutional law in NRS 171.123.

> In Rusling v. State, 96 Nev. 778, 781 (1980), the Nevada Supreme Court states:
> Even though probable cause may not exist to place a person under arrest, a police officer may, under appropriate circumstances and in proper manner, approach and detain a person for the purpose of investigating possible criminal behavior. Terry v. Ohio, 392 U.S.1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968); Stuart v. State, 94 Nev. 721, 722, 587 P.2d 33, 34 (178); Jackson v. State, 90 Nev. 266, 267, 523 P.2d 850, 851 (1974); Wright v. State, 88 Nev. 460, 464, 499 P.2d 1216, 1219 (1972); NRS 171.123(1).

The facts in Rusling are on point with the issues presented in the defendant's motion. The appellant was stopped by Las Vegas police because he resembled a person seen fleeing from an abandoned vehicle. The police searched for the person who fled for approximately one hour. They eventually stopped the appellant because he resembled the person they saw fleeing. *See*, Rusling, 96 Nev. at 780. The Court held that the brief detention and search of the defendant was appropriate. The Court noted that the following factors in coming to this decision:

> Appellant emerged from the area where the police officers had reason to believe the suspect was lurking; he matched the description broadcast by Officer Harber. Officer Shelton was, therefore, justified in approaching appellant and stopping him for the purpose of further investigation.

Id., 96 Nev. at 781.

In State v. Wright, 104 Nev. 521 (1988), the Court again addressed the brief detention associated with a *Terry* stop. The facts are even more attenuated than those in Rusling. In Wright the appellant was driving a vehicle similar to one involved in a robbery that had occurred the previous evening. The vehicle was not the same. The police had information that the robbery suspects were black, yet the occupants of the car were white. Further, the vehicle was only "in the area" of the previous robbery. The police found a bullet in plain view which lead to further contraband. The appellant sought suppression of all evidence based on Terry.

The Nevada Supreme Court held that the officers were correct in briefly detaining the vehicle and its occupants even with these facts. The Court stated:

> A stop is lawful if police reasonably suspect that the persons or vehicles stopped have been involved in criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Stuart v. State, 94 Nev. 721, 587 P.2d 33 (1978); Ildefonso v. State, 88 Nev. 307, 496 P.2d 752 (1972); NRS 171.123. * * * The officers could reasonably decide that vital information could be obtained from examining the vehicle and briefly questioning its occupants. This provided a particularized and objective basis for stopping Wright's vehicle. Cortez, *supra*, 449 U.S. at 417, 101 S.Ct. at 694.
>
> We conclude that the stop was reasonable and lawful, and did not violate respondent's constitutional rights. The bullet found lying on the floorboard was in plain view; therefore its discovery was not unlawful. California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); Wright v. State, 88 Nev. 460, 499 P.2d 1216 (1972).

Wright, 104 Nev. at 523.

The Nevada Supreme Court has held that it was not a *Terry* violation for officers to stop a vehicle based on a tip from a bar tender. Sonnenfeld, *supra*. The Court has also held that it is not a *Terry* violation to stop a vehicle based only on the fact that the trunk lock was missing. The officer was investigating whether the vehicle was stolen. Marijuana seeds found in plain view were deemed admissible after the stop. Stuart v. State, 94 Nev. 721, 722-23 (1978)("Under these circumstances, we believe the officer's conclusion was reasonable and he was justified in stopping the vehicle for routine questioning and

investigation. Since the officer had lawfully attained the position from which he observed the marijuana in plain view, he had a right to seize it and, therefore, the marijuana was properly admitted." (citations omitted)).

With the above cited cases as a framework, it is difficult to see what was inappropriate about the RPD officers actions in this case. The officers had immediately arrived on a report of a call of two people tampering with slot machines. They arrived less than ten minutes after the call. The store clerk pointed out the two people she was calling in reference to. Clearly, the brief detention was in furtherance of the investigation of criminal behavior. The rhetorical question must be asked, "If Wright was not a *Terry* violation (stop occurring the day after the crime with a car that is a different model and two individuals that are not even the same race as the original suspects), then how is this case a *Terry* violation?" The answer is that it simply is not.

The defendant's motion makes a "pretext stop" argument. The defendant attempts to buttress this argument by a reference to Alejandre v. State, 111 Nev. 1235 (1995). In a footnote, the defendant concedes that Alejandre has been directly overruled by both Gamma v. State, 112 Nev. 833 (1996), and Wren v. United States, ___ U.S. ___, 116 S.Ct. 1769 (1996). The State is unable to follow the mental gymnastics which would allow an overruled case to somehow control the issues presented by the defendant's motion. Suffice to say that both Alejandre and Gamma addressed the stop of vehicles for minor violations and subsequent searches. Those issues have no bearing in the present case given the fact that the officers were conducting a legal investigation pursuant to Terry and the defendant's consent.

The defendant's motion claims that the officers did not have a search warrant, consequently they did not have a right to search the defendant's person. This contention ignores the fact that the defendant consented to the search. As discussed, *supra*, consent negates the need for a warrant. Further, given the defendant's strange and unresponsive behavior and the officers knowledge that he had been using a piece of metal to pry the machines, the officers were within the edicts of NRS 171.1232.

A non-invasive "pat search" has long been approved by the United States Supreme Court. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ." Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923

(1972). In Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), the Court held that a pat search for weapons was appropriate simply because a person walked away from officers and entered an alley. There was no indication that there were weapons on the individual. The concern arose from his evasive behavior and the fact that he had been seen leaving a "notorious 'crack house'." Id., 508 U.S. at 368. The defendant's behavior in the instant case coupled with the officer's knowledge that a piece of metal was involved was enough to give them a right to do a "pat search".

During the "pat search" the officers detected further paraphernalia in the defendant's pockets. They were entitled to remove those items. In Dickerson, *supra*, the Court held:

> "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id., 508 U.S. at 345-76. Nothing that the officers did on September 22, 1997, violated this holding.

The seizure of the drug pipe found in the defendant's back pocket was appropriate. It was in "plain-view", consequently the officers could seize it. The United States Supreme Court has held, "[u]nder that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." Dickerson, 598 U.S. at 375 (citations omitted). The defendant attempts to get around this pernicious fact by alleging that the officers somehow did not have a lawful right to be where they were when the drug pipe was observed. The assertion is simply not supported by the facts. The officers were summoned to remove the defendant from the store. They were in a public place. Even if they did not conduct the legal *Terry* stop, the officers would still have observed the drug pipe when the defendant stood to leave.

The defendant looks into his crystal ball and comes up with two exceptions to the warrant requirement that he anticipates will be argued by the State: Terry and "plain view". He was correct. The defendant should have looked deeper, however, because he ignored the final deleterious exception which completely trumps all arguments presented in the defendant's motion: inevitable discovery.

In Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), the United States Supreme Court adopted the inevitable discovery exception to the exclusionary rule. Simply put, the Court held that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means-. . .-then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." Id., 467 U.S. at 444. The Court goes on to point out, "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Id., 467 U.S. at 446. The Nevada Supreme Court has also adopted this prevailing concept of constitutional law. In Carlisle v. State, 98 Nev. 128 (1982), the Nevada Supreme Court stated:

> We have held that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence. (Citations omitted).

Id., 98 Nev. at 129-130.

Applying the inevitable discovery doctrine to the facts presented by the defendant's motion reveals that all the physical evidence is admissible. The defendant had three outstanding warrants for his arrest. The officers, as a matter of course, would have run the defendant to determine if he had any outstanding warrants. When this occurred they would have placed the defendant into custody and the drugs would have been found during the standard inventory of his property upon booking at the jail. Consequently all the defendant's argument is for naught.

In the end, the defendant's motion is built on a foundation of sand. His claim fails because its initial premise is simply not correct. That premise is that the *Terry* stop was bad. It was not. The officers acted in complete compliance with the law. Assuming, arguendo, that the *Terry* stop was bad, the evidence is still admissible given the inevitable discovery of the evidence. For all the foregoing reasons, the defendant's motion regarding physical evidence should be denied.

B. ALL OF MR. GEISINGER'S STATEMENTS WERE OBTAINED AS A RESULT OF CUSTODIAL

INTERROGATION WITHOUT MR. GEISINGER'S FIRST BEING INFORMED OF HIS CONSTITUTINALRIGHT TO REMAIN SILENT, AND THUS, ALL STATEMENTS SHOULD BE SUPPRESSED AS UNLAWFULY OBTAINED.

The analysis of this issue is moot given the Burkholder, *supra*. The defendant consent in the same fashion as the suspect in that case.

Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, ___ (1966), requires an explanation of rights during "custodial interrogation". An officer's obligation to administer the warning attaches, "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495, 94 S.Ct. 711, 74, 50 L.Ed.2d 714 (1977). The "ultimate inquiry is simply whether there [was] a 'formal arrest or restrain on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.d 1275 (1983). "Custody" depends on an objective analysis of the circumstances, not a subjective analysis. Stansbury v. California, 511 U.S. 318, ___, 114 S.Ct. 1526, 529 (1994). In order to require the *Miranda* warning there must be both custody and interrogation.

Not all instances of police questioning are, however, custodial and/or interrogation. The United States Supreme Court has specifically removed *Terry* stops from the rubric of Miranda and its progeny. In Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), Justice Marshall, speaking for the Court, declined to extend *Miranda* warnings to traffic stops and analogous *Terry* stop situations. The Court found that these situations are "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in Miranda itself, and in subsequent cases in which we have applied Miranda." Berkermer, 468 U.S. at 439 (citations omitted).

The officers were not required to inform the defendant of his *Miranda* rights based on Berkermer. The questioning was brief, and related only to possible items which may be found during the lawful pat search. It was neither custodial, nor interrogatory. All of the defendant's statements are admissible.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

02167851

Terry Pat Search II

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Law enforcement officers are permitted to stop individuals where there is a reasonable and articulable suspicion that the person is committing, has committed or is about to commit a crime. Terry v. Ohio, 392 U.S. 1 (1968).

THE FOURTH AMENDMENT DOES NOT APPLY BECAUSE PEREZ CONSENTED TO THE OFFICER'S SEARCH AND THE TRAFFICKING QUANTITY OF METHAMPHETAMINE THAT WAS SEIZED AS A RESULT OF THAT SEARCH IS ADMISSIBLE.

"To establish a lawful search based on consent, the State must demonstrate that consent was voluntary and not the result of duress or coercion." State v. Burkholder, 112 Nev. 535, 539, 915 P.2d 886 (1996), *citing* Schneckloth v. Bustamonte, 412 U.S. 218, 248, 93 S.Ct. 2041, 2058, 36 L.Ed.2d 854 (1973). "Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances, would feel free to decline a police officer's request or otherwise terminate the encounter." Burkholder, *citing* Florida v.Bostick, 501 U.S. 429,434, 111 S.Ct. 2382, 2386 (1991). "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Burkholder, *citing* Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988).

Finally, "while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." Id. *citing* Schneckloth, 412 U.S. at 248-49, 93 S.Ct. at 2059. As such, numerous cases have held a consent voluntary even where the police did not inform the accused that they could refuse the police's requests. *See generally* United States v. Gonzales, 979 F.2d 711 (9th Cir.1992).

In Burkholder, the Nevada Supreme Court reversed a district court's order granting suppression of evidence. The district court had determined that a drug suspect had not provided consent.

In short, the Burkholder case involved an officer with a badge displayed around his neck, who approached an individual on the street, identified himself as a police officer and asked the individual for permission to search for weapons and drugs. Burkholder at 539, 888. In that case, the suspect, who was acting nervous, agreed to the search. Id. The officer in that case never told the suspect that he was free to go or that he could decline the officer's request to search. Id. During the search, the officer located methamphetamine inside the suspect's jacket. Id.

In reversing the district court's order suppressing the methamphetamine, the Burkholder Court noted that the encounter and the brief conversation prior to the search occurred on a public street. In addition, that Court further noted that, despite the fact that the officer had identified himself as a police officer and showed his badge, the evidence did not indicate that the officer there blocked the suspect's ability to proceed down the sidewalk, physically touched the suspect, displayed his weapon to the suspect, used a commanding tone in his questions to the suspect, nor made any threats to the suspect. Id.

Based on the above criteria, the Burkholder Court reversed the ruling of the district court and found that the suspect had voluntarily consented to that search. Id. The Court reached this ruling despite the suspect's claim that he was not told that he could decline to answer Freelove's requests. Specifically, and in light of the public location of the officer's questioning and the officer's non-coercive conduct towards the suspect during the questioning, that Court concluded that the suspect's consent to the search was voluntary.

PEREZ' further reliance on Minnesota v. Dickerson, 113 S.Ct. 2130 (1993), is misplaced and, again, completely vitiated by PEREZ' own conduct.

In Minnesota v. Dickerson, the United States Supreme Court reviewed the issue of whether and when an officer's plain feel would allow him to legally seize items of evidence that were not weapons. In reviewing the search of a suspect where officers felt, then seized, contraband, the Dickerson Court held that assuming a legal stop and a legal frisk, a police officer cannot seize an item that is not a weapon unless it is immediately apparent from the officer's frisk that it is contraband.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Terry Stop Standard vs. Arrest Standard Probable Cause

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

It bears noting that probable cause for a "Terry stop" is a lower standard than probable cause for arrest. *See*, Rusling v. State, 95 Nev. 773, 781(1980), Washington v. State, 94 Nev. 181, 184 (1978), Ildefonso v. State, 88 Nev. 307 (1972), and Robertson v. State, 84 Nev. 559, 562 (1968). For this reason the State is unclear why the Court can rule that the lesser standard of probable cause for a "Terry stop" was not established given the fact that the more stringent standard of probable cause to arrest had been established. The presentation of evidence may resolve these conflicts in the Courts decision.

Even assuming that the Court is holding that there was no probable cause for arrest, it is well established that a person does not have a right to physically resist an unlawful arrest. *See*, State v. Valentine, 879 P.2d 313 (Wash.App. Div. 3 1994), Jurco v. State, 825 P.2d 909 (Alaska Appeals 1992), State v. Gardiner, 814 P.2d 568 (Utah 1991), State ex rel Juvenile Department of Curry County v. Stout, 811 P.2d 660 (Oregon Appeals 1991), Hines v. State, 728 P.2d 1374 (Okl. Cr. 1986), Roberts v. State, 711 P.2d 1131 (Wyoming 1985), State v. Franz, 9 Kan.App.2d 319 (1984), People v. Mason, 632 P.2d 616 (Colo. App. 1981), State v. Hatton, 116 Arizona 142, 568 P.2d 1040 (1977), State v. Richardson, 95 Idaho 446, 511 P.2d 263 (1973), and Miller v. State, 462 P.2d 421 (Alaska 1969). It was the defendant who escalated the "Terry stop" further than required. Clearly the disregard for the commands of a deputy and the physical resistance to that deputy was a public offense. The State should be allowed to present all the facts which justify the detention which resulted in the defendant's outburst. Only then will the Court be able to make an informed decision.

The Court and the defendant's reliance on the probable cause declaration is misplaced. Probable cause declarations are simply brief statements of facts sufficient to support an arrest. They are not full explorations of all the facts and nuances of a particular arrest. Further, law enforcement officers should not be held to such rigorous standards when completing these forms. The officer should only state the

probable cause to believe that a crime has been committed and the probable cause to believe that the defendant is the person who committed that crime. Officers should not be expected to anticipate and respond to all the Constitutional ramifications of an arrest in their probable cause declarations. This area is left to judges and lawyers. It is for this reason that a hearing is required.

In conclusion, the State does believe that the probable cause declaration does contain facts which can be used in the hearing

requested. They are not all the facts which the Court should consider. There may be other information which Deputy Lee had that he did not feel were germane to the low threshold required for probable cause. The probable cause declaration should be

considered the beginning of the journey, not the end.

CONCLUSION

DATED this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Terry Stop – Articuable Suspicion

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

1. A stop, or detention, need not be supported by probable cause but by a reasonable and articulable suspicion of criminal activity.

There are three categories of police interactions which courts have recognized: "(1) the 'consensual encounter' . . .; (2) the 'detention,' which is a seizure strictly limited in length, scope and purpose, and for which a police officer must have an articulable suspicion that the civilian has committed or will commit a crime; and (3) the 'arrest,' for which a police

///

officer must have probable cause." Arterburn v. State, 111 Nev. 1121, 1125, 901 P.2d 668, 670 (1995)(citations omitted).

Defendant acknowledges that NRS 171.123(1) is controlling and that it describes when an officer may detain a person he suspects of committing a crime; it reads, "Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime."

An analysis of Gama v. State, 112 Nev. 833, 920 P.2d 1010 (1996), is misplaced. Gama applies to pretextual stops, those inwhich an officer wishes to stop a vehicle to investigate a crime unrelated to the traffic infraction for which the vehicle was stopped.

NRS 171.123 does not require either probable cause or a clear violation of law to justify a detention; it only requires a reasonable and articulable suspicion that a crime has been, is being or is about to be committed. The title of NRS 171.123 itself bears witness to this fact, "Temporary detention by peace officer of person **suspected** of criminal behavior . . .." Moreover, reference to the facts of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), bear out the same point. In that case suspect was detained because he was suspected of casing a store for robbery when he was seen walking repeatedly back and forth in front of, and looking into, the store. Id. Despite the fact that he had not yet committed a crime, the Court found the

officer's suspicions reasonable and decision to stop the suspect to investigate justified. Id.

See, e.g., U.S. v. Banks, 971 F.Supp. 992 (E.D.Va. 1997)(5 to 7 mph below 65 mph limit and weaving to the right of lane are each a valid basis to stop and investigate either intoxication of extreme sleepiness); State v. Nelson, 817 P.2d 1344, 109 Or.App. 97 (1991)(15-20 mph below 45 mph limit after leaving bar with "a little difficulty walking" justified investigatory stop); Clark v. State, 738 P.2d 772 (Alaska App. 1987)(Sliding on gravel while stopping at intersection and 15 mph below 40 mph limit justified stop); and, State v. Flowers, 953 P.2d 645, 131 Idaho 205 (Idaho App. 1998)(45 in a 55 mph zone, weaving in own lane, crossing fog line and touching center line gave rise to reasonable suspicion).

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Testify Agreement To

A G R E E M E N T

A. INTRODUCTION

This is an agreement between the Washoe County District Attorney's Office and made with Deputy District Attorney [deputy's name] with the full knowledge and consent of [defendant's name] attorney [defendant's attorney's name]. The agreement becomes effective upon being signed by [defendant's name], his/her attorney, [defendant's attorney's name], and Deputy District Attorney [deputy's name]. There is no agreement of promise of any kind between the District Attorney's Office and [defendant's name] that is not set forth in this document.

B. CONSTITUTIONAL RIGHTS

1. I, [defendant's name], understand that I have certain constitutional rights that are set forth below.

2. I, [defendant's name], have been advised by my attorney that I do not have to answer questions or make statements of any kind; I know that I have the right to remain silent and that by entering into this agreement voluntarily, I waive my privilege against self-incrimination.

3. I, [defendant's name], also know that I have the right to have my attorney with me during all conversations with law enforcement officers or members of the District Attorney's Office; I do not give up this right as part of this agreement, but I may give it up from time to time on the advice of my attorney.

4. I, [defendant's name], waive my right to trial by jury, at which trial the State would have to prove my guilt on all elements of each charge against me beyond a reasonable doubt.

5. I, [defendant's name], waive my right to confront my accusers, that is, the right to confront and cross examine all witnesses who would testify at trial.

6. I, [defendant's name], waive my right to subpoena witnesses for trial for me.

C. PENDING CHARGES

I, [defendant's name], understand that I am currently charged in an [charging document's name] filed in [where filed], case number [case number] with [charges] each a [level of crime(s)].

D. OBLIGATIONS

1. I, [defendant's name], understand that under this agreement I am undertaking certain obligations, and I willingly and voluntarily do so.

2. I, [defendant's name], have information regarding [what the defendant will provide].

3. I, [defendant's name], agree to provide a truthful statement, responding to questions, regarding my involvement and that of all others, specifically including #, in the # that is the subject of investigation by the [agency] in their case numbered [case number].

4. I, [defendant's name], accept the duty to cooperate fully and honestly, by providing truthful information, in any investigation by the [agency] or the Washoe County District Attorney's Office concerning the [crime] that is the subject of the investigation by the [agency] in their case numbered [case number].

5. I, [defendant's name], understand that besides telling [agency] Officers and/or Deputy District Attorney's or their investigators what I know and besides a participating in the possible investigations cited above, I may be required to testify truthfully before the Washoe County Grand Jury, or in Justice Courts and/or District Courts in the State of Nevada; I agree to give such testimony and understand that I will be required to meet all deadlines established by the District Attorney's Office.

6. I, [defendant's name], understand that, overriding all else, my most important obligation is to tell the truth and to tell only the truth; always, both during the investigation and when in a court or in front of a grand jury, I am required to tell only the truth, no matter whether the questions are asked by police officers, prosecutors, investigators from the District Attorney's Office, defense attorneys, grand jurors or judges.

7. I, [defendant's name], am aware of the provisions of NRS 174.061; I understand that this agreement is void if any testimony I give pursuant to this agreement is false; I understand that nothing in this agreement limits any testimony I give pursuant to this agreement to any predetermined formula; I understand that nothing in this agreement makes this agreement contingent on any testimony I give pursuant to this agreement contributing to a specified conclusion.

8. I [defendant's name], agree to submit to polygraph examination at the State's request and understand that this agreement is void if my responses on such test or tests are not fully truthful, as indicated by the results of the polygraph examination or examinations.

9. I, [defendant's name], understand that should I disobey any law of the United States or of the State of Nevada (except minor traffic offenses) this agreement shall be void.

E. BENEFITS

1. I, [defendant's name], expect certain benefits as a result of keeping my part of this agreement; those benefits have been explained to me by my attorney, [defendant's attorney's name]; I understand that in return for my assistance as set forth above, I am entitled only to those benefits set out below.

2. I, [defendant's name], am entitled, if I cooperate fully as outlined above, to be charged with and plead guilty to [deal]; I understand that this agreement in not binding upon the District Court judge who will impose whatever sentence that judge deems fair and appropriate within the maximum limit prescribed by NRS [applicable statute], taking due account of the gravity of the particular offense and of my character.

3. I, [defendant's name], understand that no immunity or promises of dismissal have been made to me and no offer or "deal" has been made regarding anything other than the pending criminal case against me in [court], case numbered [case number]; I understand that I am not entitled to any immunity or promises of dismissal or any charge of perjury, false swearing, contempt, or subornation of perjury arising from actions under this agreement.

F. CONCLUSION

All parties to this agreement acknowledge by their signatures they have read the agreement, understand its terms and that what is set forth above is the complete agreement between [defendant's name], and the Washoe County District Attorney's Office and no other promises, express or implied have been made by either party.

SIGNED this _____ day of _____, .

_____

[defendant's name]

SIGNED this _____ day of _____, .

_____
[defendant's attorney]
Attorney for Defendant

SIGNED this _____ day of _____, .

_____
[deputy's name]
Deputy District Attorney

See also Ricketts v. Adamson, 107 S.Ct. 2680 (1987).

[4] The precise statutory language of NRS 174.061 requires that the written agreement "include a statement that the agreement is void if the defendant's testimony is false." As noted above, we are of the opinion that the Legislature mandated the inclusion of such invalidating language in plea agreements in order to deprive the testifying defendant of an undeserved bargain where the recipient of the bargain testifies falsely. We do not glean from the measure a legislative purpose to prejudice the defendant against whom the testimony is given. **We therefore conclude that neither the provision added by the State requiring "truthful testimony," nor the statutory provision declaring an agreement void when perverted by false testimony are to be included within the written agreement provided for a jury's inspection. In other words, our district courts have both the discretion and the obligation to excise such provisions unless admitted in response to attacks on the witness's credibility attributed to the plea agreement.**

[5] Despite our conclusion, we perceive no compelling reason to reverse Sessions' conviction on the present facts. The cautionary jury instruction given to the jury on the risks inherent in plea agreements negated any prejudicial effect the written plea agreement may have otherwise had on the minds of the jurors. Although the district court should have exercised its discretion to excise the "testify truthfully" and "void if false" language from the agreement prior to inspection by the jury, the error was harmless. See Shaw, 829 F.2d at 717-18 cautionary jury instruction rendered erroneously allowed prosecutorial vouching harmless).

890 P.2d 792, 111 Nev. 328, Sessions v. State, (Nev. 1995)
---------- Excerpt from page 890 P.2d 796.

Time Served Credit

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

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* * *

THE STATE OF NEVADA,

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
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I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Credit for Time Served. Defendant argues that the time he spent in house arrest prior to his eventual sentencing in his case should be credited to his time served. In support of his position, he cites Grant vs. State, 99 Nev. 149 (1983). In this case, the Supreme Court of Nevada held that the record of trial was devoid of any evidence of restraints imposed during Grant's stay in a residential drug treatment program as a condition of his probation. The Court declined to give him credit for time served as a result. The Court went on to cite cases from other jurisdictions that held that there should be no credit for time served in a residential treatment facility as a condition of probation against the probationer's sentence. From this case, it is clear that the Supreme Court of Nevada would most likely not grant credit for time served against a sentence for time spent in residential drug treatment facilities as a condition of probation. It is highly unlikely that defendant in the instant case was under equal or greater restraint while on house arrest as one who is confined to a residential treatment facility. As set out in defendant's brief, defendant had to contact Court Services on a daily basis. There is no indication that this contact had to be in person or by telephone. Also, he did have to wear an electronic monitoring device. However, it does not appear that the restraint on defendant was such that he should be given credit for time served. Therefore, on the basis of Grant, cited above, the State respectfully requests that this Honorable Court deny his Motion to Amend Judgment of Conviction.

Further, the Supreme Court of Nevada has held that a defendant must be given credit for time served against his sentence for any time spent in county jail. See generally, Merna vs. State, 95 Nev. 144, 591 P.2d 252 (1979). Again, it is clear that the time defendant spent on house arrest is not nearly so restrictive as the time he spent in county jail prior to being placed on house arrest. Defendant received credit for time

served in jail, but not for his time spent on house arrest. This Honorable Court was correct in making those credit for time served determinations.

Additionally, the Supreme Court of Nevada has held that the defendant is not entitled to credit for time served for time he spent on probation prior to revocation and imposition of his underlying sentence to prison. See Van Dorn vs. Warden, 93 Nev. 524, 569 P.2d 938 (1977). Again, there is little evidence to show that the nature and level of restraint defendant in our case had imposed on him during his house arrest was more restrictive than would have been imposed on Van Dorn while on probation.

Moreover, the Supreme Court of Nevada has held that the defendant is not entitled to credit for time served while on house arrest as a condition of his probation. In State vs. Nevada, 109 Nev. 1084, 864 P.2d 294 (1993), the Court held that defendant was not entitled to any credit for time served in residential confinement as a condition of his probation. He was given 120 days in that program as a condition of probation. When his probation was revoked the District Court gave him no credit for time served. The Supreme Court upheld the lower court's decision in this regard.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Unavailable Witness Prelim Transcript

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The testimony of a witness taken at preliminary hearing may be used at trial in criminal cases if the defendant was represented by counsel, and the witness subsequently becomes unavailable. NRS 171.198(6)(b) states in pertinent part,

> 6. The testimony so taken [by a court reporter which is reduced to writing and authenticated] may be used:
>
> (a) By the defendant; or
>
> (b) By the state if the defendant was represented by counsel or affirmatively waived his right to counsel, upon the trial of the cause, and in all proceedings therein, when the witness is sick, out of the state, dead, or persistent in refusing to testify despite an order of the judge to do so, or when his personal attendance cannot be had in court.

This statute has been applied and expanded through case law in Nevada.

In the case of Drummond v. State, 86 Nev. 4 (1970), the Court set forth three preconditions which must be met in order for the transcript of the testimony of a material witness given at a preliminary hearing to be received into evidence: "first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." In accord, Funches v. State, 113 Nev. 916 (1997); Anderson v. State, 109 Nev. 1150 (1993); Aesoph v. State, 102 Nev. 316 (1986).

NRS 51.055 relates to when a witness is considered unavailable to testify. It states,

> 1. A declarant is "unavailable as a witness" if he is:
>
> (a) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement;
>
> (b) Persistent in refusing to testify despite an order of the judge to do so;
>
> (c) Unable to be present or to testify at the hearing because of death **or then existing physical or mental illness or infirmity**; or

(d) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance or to take his deposition.

2. A declarant is not "unavailable as a witness" if his exemption, refusal, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying. (Emphasis added).

Further, NRS 51.325 states,

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, is not inadmissible under the hearsay rule if:

1. The declarant is unavailable as a witness; and

2. If the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same.

The Drummond case, *supra*, does not impose any requirement on the type of cross-examination that takes place at preliminary hearing. Thus, cross-examination by the defense at preliminary hearing does not have to have taken the place of the actual trial cross-examination. The only requirement is that the three-pronged test stated above be satisfied in order to meet an accused's Sixth Amendment right to confrontation as applied to the States through the 14th Amendment. See, Funches v. State, supra; Anderson v. State, supra; and Aesoph v. State, supra.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
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Vagueness Unconstitutionality

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

> The applicable statute states:
> A person who annoys or molests a minor is guilty of a misdemeanor. For the second and each subsequent offense he is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less that 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.

NRS 207.260.

The Nevada Supreme Court has articulated a clear test for vagueness challenges. The test is whether the terms of the statute are so vague that people of common intelligence must necessarily guess at their meaning. Sereika v. State, 114 Nev. 142, 955 P.2d 175, 177 (1998) citing Cunningham v. State, 109 Nev. 569, 570 (1993). The rule, however, is not to be applied in a vacuum. The court must consider the actions of the defendant on a case by case basis. A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808 (1954)(emphasis added).

Thus the ultimate issue to be decided is whether the petitioner received fair notice under the statute that his actions of grabbing a 10 year old girl and pulling her to his body was unlawful. Clearly, a person of ordinary intelligence would deem this action to be unlawful.

III. ARGUMENT

The Petitioner's application must be denied for several reasons. First, a person of ordinary intelligence would have clearly realized that the petitioner's actions were unlawful; second, the issue of vagueness was raised and rejected in California on an almost identical statute; third, the application of an objective test alleviates the possibility of multiple definitions.

1. A Person of Ordinary Intelligence Would Know that Pulling a 10 Year Old Girl to his Body was Unlawful

As noted above, the statute proscribes acts that annoy or molest a minor child. The term "molest" has a very specific meaning in every day life. When one claims, "I have been molested." A very clear

understanding is communicated. That understanding is that the victim was groped or fondled against her will. This definition of molest is even included in the petitioner's brief. According to the petitioners cited source, Webster Dictionary and Thesaurus, 1999, molest means to force physical and usually sexual contact. *See* Petitioner brief at 9.

It is incredulous that the petitioner claims that he did not know, and reasonably could not have known, that the act of pulling a 10 year old girl against his body was unlawful.

2. California's Statute is Constitutional

Furthermore, California has a strikingly similar statute.

> (a) Every person who annoys or molests any child under the age of 18 shall be punished by a fine not exceeding one thousand dollars ($1,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.

Cal. Penal Code § 647.6

The issue of the vagueness of this statute was settled long ago in California. "It seems equally clear that the meaning of the words "to annoy or molest", as employed by the Code section, are sufficiently definite and certain to advise the public generally what acts and conducts are prohibited." People v. Pallares, 246 P.2d 173, 176 (1952). The Court cites several dictionary definitions and then states, "when the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender." *Id* at 177.

In a direct challenge to the constitutionality of this statute on the grounds of vagueness, the Ninth Circuit also stated the statute was constitutional. "We find, in accord with a host of California cases which have treated this allegation, that the statute is sufficiently definite to state a public offense. The words "molest" or "annoy" have accepted community meanings and are appropriate standards for a criminal statute." Fernandez v. Klinger, 346 F.2d 210 (9th Cir. 1965).

3. The Application of an Objective Test

Because the Nevada and California statutes are so similar, it is logical to look at California's application of their statute to determine its reasonableness. As noted by the courts, the section must be construed reasonably as setting up an objective test for annoyance or molestation. Pallares at 177. Thus, a

childish and wholly unreasonable subjective annoyance, such as a dislike for proper correction by a teacher is not covered. *Id.*

IV. CONCLUSION

Dated this _____ day of _____, .

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Vagueness Unconstitutionality II

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Defendant claims NRS 200.030 is facially unconstitutional as vague. Plaintiff will respond to this contention, yet as pointed out below, defendant has the further burden of proving that the statute is vague as applied to his conduct.

The power to define what constitutes a crime lies exclusively within the power and authority of the legislature. Acts of the legislature are presumed constitutional. The party challenging, the enactment bears the burden of making a Siclear showing" of invalidity. Ottenheimer

v. Real Estate Division, 97 Nev. 314, 315, 629 P.2d 1203 (1981); Wilmeth v. State, 96 Nev. 403, 405, 610 P.2d 735

(1980). - ‘‘

Statutes should be construed, if reasonably possible, so as to be in harmony with the constitution. Sheriff v. Luqman, 101 Nev. 149, 154, 697 P.2d 107 (1985); State v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982). Where the intent of the legislature is clear, it is the duty of the Court to give affect to such intention and to construe the language of the statute to effectuate, rather than to nullify, its manifest purpose. State v. Martin, 99 Nev. 336, 340, 662 P.2d 634 (1983); Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396 (1975).

It is well settled that the Due Process Clause of the Fourteenth Amendment prohibits the State from holding an individual "criminally responsible for conduct which he could

> not reasonably understand to be proscribed." U.S. v. Harriss, 347 U.S. 608, 617—618 (1954). However, "the Constitution does
>
> > not require impossible standards of specificity in penal statutes. The test for granting sufficient warning as to proscribed conduct will be met if there are well settled and ordinarily understood meanings for the words employed when viewed in the context of the entire statutory provision." Sheriff v. Martin, supra. The prohibition against excessive vagueness:
> >
> > > does not invalidate every statute which a reviewing court believes could have been draf~ted with greater precision. Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid...All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden. Rose v. Locke, 423 U.S. 48, 49—50, (1975).

If an enactment does not implicate constitutionally protected conduct, the Court may strike it down as vague on its face only if it is impermissibly vague in all of its applications. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982); Sheriff v. Martin, supra. Defendant has not attempted, much less succeeded, to meet this proof.

NRS 200.010 defines murder in pertinent part as "the unlawful killing of a human being, with malice aforethought, either express or implied.. .The unlawful killing may be effected by any of the various means by which death may be occasioned." NRS 200.020 defines malice as being implied when:

No considerable provocation appears, or when all the circumstances of the killing show an

abandoned and malignant heart.

Malice as applied to murder does not necessarily import ill will toward the victim but signifies a general malignant recklessness of the life of another or disregard of social duty. Thedford v. State, 86 Nev. 741, 744, 476 P.2d 25 (1970). The presence of malice is not to be decided by a magistrate or- a trial judge, bul by the trier of fact at trial of the case. Ibid.

Proving implied malice means proving commission of wrongful acts from which, absent any proof of actual intent to harm, abandoned and malignant heart can be inferred. Keys v. State, 104 Nev. 736, 740, 766 P.2d 270 (1988). When the murder is perpetrated by means of child abuse (physical injury of a nonaccidental nature to a child), it is first degree murder. See NRS 200.030.

What defendant seems to overlook is that the statute requires not only causation in fact (that the death was caused by defendant's conduct), but also that RICE acted with malice, express or implied. Intent to kill, however, is not required as an element of a murder which is supported by implied malice. Cf. Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986).

NRS 200.030 CANNOT BE CONSTRUED AS VAGUE AS APPLIED TO DEFENDANT

Regarding a defendant's conduct and intent, the Due Process Clause requires that the individual was or should have been on-notice that his conduct was

proscribed. See Sheriff v. Martin, supra, at page 342. A challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as it may be applied to the conduct of others. U.S. v. Harriss, supra, at page 617—618.

In Bludsworth v. State, 98 Nev. 289, 646 P.2d 558 (19Q2), the oourt had occasion 'to respond to a defendant's claim that Nevada's child abuse statute (NRS 200.508), was unconstitutionally vague with respect to the use of the phrase "unjustifiable physical pain or mental suffering.[1]' The court stated at page 293:

> Our statute, as applied to these appellants, is clearly constitutional. A criminal statute is unconstitutionally vague only if one cannot reasonably understand that contemplated conduct is proscribed. United States v. National Dairy Corp., 372 U.S. 29, 32 through 33 (1963). The State alleged and proved that appellants either struck Eric on the head or permitted him to be struck. In light of the evidence concerning the violence or force used against Eric and the severity of his injuries, it is untenable for appellants to claim that they could not have reasonably known their conduct was criminal. (Emphasis added).

Venue Change

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

LEGAL STANDARD FOR CHANGE OF VENUE

Contrary to the position stated in the Instant Motion, there are actually two different time periods in which a criminal defendant can request a change of venue. Obviously by the inherent nature of the Instant Motion, defense counsel is conceding that insufficient evidence exists to establish a change of venue prior to the jury selection process.

The State has no objection to the defense reserving their right to raise a Motion For Change of Venue should such factual evidence exist during the jury selection process.

The State is confident that at that time, should the Court will conduct the appropriate inquiry as to whether sufficient facts exist to render a fair and impartial jury impossible to seat. Further, that the articulated tests set

forth in Sonner v. State, 112 Nev. 1328, 930P.2d 707 (1996), will be properly applied regarding any pre-trial publicity.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Verdict Overturned Juror Misconduct

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE CONCLUSIONS OF LAW REACHED BY THIS COURT DO NOT CONSTITUTE SUFFICIENT LEGAL BASIS FOR SETTING ASIDE THE VERDICT OF THE JURY AND ORDERING A NEW TRIAL.

Basis 1 - Juror Misconduct - Use of Dictionary

The Court found that a dictionary was brought to the proceedings, that it did not constitute misconduct *per se*, but that it should be considered along with the other conclusions of law as support for the granting of a new trial. Order, December 24, 1998, p.4. It was noted during a hearing on the matter, that the terms malice and malicious were marked.

The Court cites to Granite Construction Company v. Rhyne, 107 Nev. 651, 817 P.2d 711 (1991). In that case, Granite claimed error because the judge had allowed the jury to take a dictionary into the room, stating, in part, that the court had examined the pertinent words and found nothing inconsistent with the court's instructions. 107 Nev. at 652.

In the case at bar, when it was brought to the Court's attention that a juror had attempted to bring a dictionary into the jury room, the foreperson was brought into open court and admonished as follows:

> THE COURT: I admonish you again that you're restricted to the use of legal instructions that I gave you, and you can't utilize outside sources. Anything you might have heard or discussed about that is to be disregarded and admonished not to consider, okay?
>
> FOREMAN KELTNER: Yes.

Transcript of the Trial, Volume IV, p.649, ll. 8 -15.[34]

The admonishment provided by the Court, which was agreed to by counsel for both parties, is sufficient to absolve any "taint" of the dictionary's influence as an outside source. There is nothing in the record, including the affidavits provided

by defendant, that would lead this Court to believe that its admonishment was not followed.[35]

Basis 2 - Juror Misconduct "Prejudicial External Information"

It is the State's contention that the foreperson's behavior, even if assumed true, goes directly to the deliberative process and should not be considered by the Court pursuant to NRS 50.065(2)(a)(b)(statements which go to the effect of anything upon the state of mind of a juror in reaching the verdict are inadmissible); see also, Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997).

Questions relating to jury polling and the jury's understanding of the court's instructions go to the deliberative process. In Johnson v. State, 593 So.2d 206 (Fla. 1992), the Florida Supreme Court held that the testimony of the foreperson about polling during deliberations and the jury's understanding of the court's instructions was inadmissible. It stated: "This testimony essentially inheres in the verdict as it relates to what occurred in the jury room during the jury's deliberations." 593. So.2d at 210.

Similarity, post-verdict claims of coercion or hostility have also been held inadmissible. See, U.S. v. Moses, 15 F.3d 774 (8th Cir. 1994)(court properly declined to investigate a juror's reports of hostility during deliberations and his post verdict belief that the defendant was innocent as reflecting the juror's thought processes); United States v. Miller, 806 F.2d 223 (10th Cir. 1986)(holding that juror's second thoughts about a verdict do not necessitate further inquiry or a new trial).

---

[34]It should be noted that the Court admonished the foreperson a second time, after additional questioning by Ms. Pusich. See, Transcript of the Trial, November 19, 1998, p. 650, ll. 2 - 7.

[35]The affidavits of the following jurors make it clear that the admonishment of the Court was considered and that the dictionary definitions did not affect the verdict. See,

There exists a strong policy basis for rejecting attempts by jurors, lawyers and others to impeach verdicts. Freedom of deliberative thought and action is central to the institution of trial by jury. This institution is endangered by delving into the deliberative process.

> Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled... The most frequently discerned source of pressure is relentless questioning by litigants ... [E]xposure of jury deliberations brings to light not only differences of opinions among jurors, but also decisional premises with which various members of the public are bound to disagree. Like any fact finder, the jury has as one of its chief aims the "authoritative resolution" of disputes in a world that is rarely black and white. If the public is to be persuaded to entrust controversies to the judicial system, what is crucial, even more than that the truth be found, is that it appear to be found through a legitimate, reliable process; as long as the ultimate determination of closely contested issues continues to depend on jury verdicts, the law has an obligation to maintain general respect for those verdicts, to avoid exposing them to easy and obvious criticism.

Public Disclosures of Jury Deliberations, 96 Harv.L.Rev. 886, 891 (1983)(emphasis added).

The United States Supreme Court has recognized, in accordance with the above-cited analysis, that there is a substantial policy interest in insulating the jury's deliberative process as well as enforcing the common-law rule that prohibits the admission of a juror's testimony to impeach its verdict. Furthermore, the United States Supreme Court has recognized that other sources of protection exist to ensure a competent jury, which do not intrude into the jury's domain. Specifically, "jurors are observable by each other and may report inappropriate juror behavior to the court *before* they render a verdict." Tanner v. U.S., 483 U.S. 107, 127, 107 S.Ct. 2739 (1987)(emphasis added). Based upon the above analysis, claims regarding the deliberative process, especially from a clearly disgruntled juror, with 'buyer's remorse" should not be considered

Every authority cited in the instant motion has, as a factual predicate, the existence of some cooperation by the defendant that was fully performed prior to the State attempting to withdraw from negotiations. No such fact exists in this case nor can one be claimed by defense counsel.

The Nevada Supreme Court has held, "the greater weight of authority supports the state's contention that a prosecutor can withdraw a plea bargain offer any time before a defendant pleads guilty, so

long as the defendant has not detrimentally relied on the offer." State v. Crockett, 110 Nev. 838 (1994) ("detrimental reliance," a legally defined term, requires a material inability for the defendant to defend his case). The Ninth Circuit Court of Appeals has held that either a defendant or the State may withdraw its consent to a plea bargain until the Court has accepted the defendant's plea. United States v. Washman, 66 F.3d 210 (9th Cir. 1995).

The United States Supreme Court has held, "a plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the constitution." Mabry v. Johnson, 467 U.S. 504, 507-08, 104 S.Ct. 2543, 2546-47 (1984). The Mabry Court went on to hold "neither is the question whether the prosecutor was negligent or otherwise culpable in first making and then withdrawing his offer relevant. The due process clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." Id., at 511, 104 S.Ct. at 2548.

> Other Courts are unanimously in accord with the authority cited above. For example, "[t]hus, the realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court."

United States v. Ocanas, 628 F.2d 353, 358 (5th Cir. 1980), cert. denied, 451 U.S. 984, 101 S.Ct. 2316 (1981); see also, United States v. Papaleo, 853 F.2d 16, 20 (1st Cir. 1988); Spann v. Wainwright, 742 F.2d 606 (11th Cir. 1989).

CONCLUSION

Victim's Character Evidence

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION IN LIMINE – CHARACTER OF VICTIM

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Evidence of the victim's character is inadmissible in a homicide case unless: (1) Where character or a trait of character of a person in an essential element of a charge, claim or defense; and (2) where the character of the victim relates to the reasonableness of force used by the accused in self defense. State v. Sattler, 956 P.2d 54, (Mont. 1998); State v. Arrasmith, 1998 WL 151494 (Idaho App. 1998).

The Nevada Supreme Court in addressing character evidence pursuant to the statutory provisions of NRS 48.045 stated:

> [B]efore any evidence is admissible, it must be relevant. NRS 48.025(2). Character evidence is no exception.

Coombs v. State, 91 Nev. 489, 538 P.2d 162 (1975).

See also Libby v. State, 109 Nev. 905, 915, 859 P.2d 1051, 1057 (1993) (evidence of a victim's character or trait of character is not admissible unless specifically brought into issue). In Coombs the court addressed the defense attempt to proffer a self-defense case and sought to admit evidence of the victim's violent character.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. Further, determinations of relevancy are within the discretion of the trial court. Brown v. State, 107 Nev. 27 (1991).

Further, there is a requirement that even if a showing of relevance can be made, this court must determine whether the probative value outweighs the prejudicial effect of such evidence. People of Territory of Guam v. Ted Taotao, 896 F.2d 371 (9th Cir. 1990); State v. Vierra, 872 P.2d 728 (Idaho App. 1994).

Therefore, the State specifically requests to this Court an Order prohibiting the defense from offering any evidence of the victim's character without a prior showing of the relevance of that testimony and that the probative value outweighs any prejudicial effect outside the presence of the jury. Such a procedure will ensure that only relevant evidence is admitted and that no attempt is made to improperly taint the victim's character in front of the jury in this case.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Victim's Character Admissibility Limits Reputation and Opinion

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 48.045(1) (b) permits the admission of relevant character evidence pertaining to the victim of a crime. However, pursuant to MRS 48.045 (1), proof of character may be established only by testimony as to reputation or in the form of an opinion. The character of the victim cannot be established by proof of specific acts pursuant to NRS 48.045(1) (b) and MRS 48.055(1) See also Government of Virgin Islands v. Carino, 631 Fed. 2d 226 (Third Cir. 1980)

The Nevada Supreme Court has set forth the limited circumstances in which specific acts of violence by the victim of a crime may be admissible where self-defense is alleged. In Burgeon v. State, 102 Nev. 43 (1986), the Court held:

> When it is necessary to show the state of mind of the accused at the time of the commission of the offense for the purpose of establishing self-defense, specific acts which tend to show that the deceased was a violent and dangerous person may be admitted, provided that the specific acts of violence of the deceased were known to accused or had been communicated to him. Burgeon, Id. at pp.45-46, citing State v. Sella, 41 Nev. 113 (1970)

Defendant's motion acknowledges Burgeon -- and then asks this Court to ignore it. Defendant's motion notes that various commentators and appellate courts of other states have stated that specific acts of the victim should be admissible in self defense cases even if the charged defendant was unaware of those acts. However, defendant elects to ignore the fact that

the Nevada Supreme Court has reached the opposite conclusion in Burgeon.

CONCLUSION

Victim Impact Statement Non-Capital Murder

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Nevada Revised Statute 176.015 permits victims to address the jury and provide what is known as "victim impact evidence". Nevada Revised Statute 175.552 permits wide latitude in the type of evidence presented to a jury in a murder case. The Nevada Supreme Court has held that these statutes permit a victim to "express an opinion regarding the defendant's sentence in non capital cases." Witter v. State, 112 Nev. 908 (1996)(citing Randell v. State, 109 Nev. 5 (1993)). The State of Nevada will offer any and all evidence permitted under the law.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Voir Dire Individual Sequestered

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION FOR INDIVIDUAL SEQUESTERED

VOIR DIRE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NO AUTHORITY PRESENTED THAT SUPPORTS THE RELIEF REQUESTED

Careful review of the remaining arguments and authorities set forth in the instant motion reveals the concession by the authors that the authority they are relying on does not precisely support the relief requested, to wit, individually sequestered voir dire throughout the jury selection process. Further, careful review of the authorities cited indicate only one case that stands for the proposition of individual sequestered voir dire during the death penalty questioning process.[36]

The State would submit that the analysis of the instant motion should start in reverse order, specifically, that the defense is requesting individual voir dire throughout the entire jury selection process. The defense has failed to cite any case law supporting the proposition that individual voir dire is required. In fact, the authorities cited in the instant motion merely stand for the proposition that under certain circumstances courts have held that individual voir dire is appropriate when potentially sensitive material is discussed that could possibly taint other panel members.

NEVADA LAW REGARDING VOIR DIRE

The Nevada Supreme Court has consistently stated that the discretion to conduct voir dire is largely within the discretion of the trial court. Leone v. Goodman, 105 Nev. 221, 223, 773 P.2d 342, 343 (1989).

Noticeably absent from the defendant's instant motion is the Nevada Supreme Court decision in Haynes v. State, 103 Nev. 309, 739 P.2d 497 (1987). The court held:

> Absent a showing that the district court abused its discretion or that the defendant was prejudiced, this court shall not disturb a district court's determination to conduct a collective voir dire of perspective jurors.

[36] Hovey v. Superior Court, 28 Cal.3rd 1 (1980).

Summers v. State, 102 Nev. 195, 718 P.2d 676 (1986)(capital case); see Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); Cunningham v. State, 94 Nev. 128, 575 P.2d 936 (1978); NRS 175.031. While some perspective jurors may be inhibited from speaking frankly about their exposure to and impressions of mental illness, defense counsel could have asked the trial court during collective voir dire for independent, sequestered voir dire as to any perspective juror suspected of holding back on this subject matter. Haynes, 103 Nev. at 314, 739 P.2d at 501.

Contrary to the specific remedy requested in the instant motion, to wit, a pre-trial order for individual and sequestered voir dire, the defense has failed to set forth any facts or law that would support such a remedy. Therefore, the motion should be denied in its entirety.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

_____
RICHARD A. GAMMICK
District Attorney

_____

Deputy District Attorney

Voir Dire Questionnaire

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.

, Dept. No.

Defendant.

_____/

PROPOSED VOIR DIRE QUESTIONS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and hereby files the State's proposed questions for Voir Dire.

1. Does everybody understand that the law prohibits attorneys and parties from talking to jurors during the trial? Therefore, if I see you outside of the courtroom and do not talk to you, you'll promise not to be offended?

2. Have either you or your spouse ever applied to any law enforcement agency for a job?

3. Are any of you members of law enforcement or related to law enforcement officers?

4. Have any of you, or a member of your family, ever been the victim of a violent crime?

5. Do any of you have any health problems which may affect your service as a juror?

6. Do any of you have any religious affiliation or beliefs that would prevent you from serving as a juror and rendering a verdict?

7. Does any member of the prospective jury panel have any prior jury experience? Was there anything in your prior jury experience that either upset or agitated you to the extent that jury service was an unsatisfactory experience?

8. Does any member of the prospective jury panel have any problem understanding the English language?

9. Does anybody on the prospective panel require regular or frequent medication or medical care and attention?

10. Does any member of the prospective jury panel have any projects and progress at your job which would affect your ability to concentrate if you were selected to serve as a juror on this particular case?

11. Is any member of the prospective jury panel currently involved in a lawsuit as a plaintiff or defendant?

12. Have you or any member of your family ever been employed by an attorney?

13. Has any member of the jury panel ever received any formal training in law?

14. Do any of the members of the prospective jury panel have any relatives or close friends who have had any training in law?

15. Have you or any member of your family ever been enlisted in any branch of the armed forces of the United States of America?

16. Have you or your spouse ever been a member of a grand jury?

17. Have you or any member of your family or friends ever been accused in any criminal action?

18. Have you or any member of your family or any acquaintance ever been a witness in a criminal case?

19. Have you or any member of your family ever been a witness in a criminal case?

20. Have you or any member of your family or a friend ever been a victim of a crime?

21. Have you or any member of your family or acquaintance ever been arrested?

22. Is there any member of the prospective jury panel currently on a felony-deferred adjudication or probation?

23. Are you a member of any law enforcement group such as the 100 Club, Mothers Against Drunk Drivers, or Parents of Murdered Children?

24. Have you, your spouse or any member of your family or friend ever been connected with the District Attorney's Office?

25. Is anyone on the prospective panel familiar with any of the witnesses in the case?

26. Has anybody on the prospective panel ever been involved in a lawsuit involving defense counsel Dennis Widdis?

27. Have you or any member of your family, or a close personal friend, ever been associated with, or worked with, any program that was dedicated to the rehabilitation of persons convicted of a crime?

28. Do you know, or have you known, anyone who has been to the penitentiary?

29. What are your feelings in general about the criminal justice system?

30. Have you known anyone who has had a serious problem as a result of drug use?

31. Have any of you known other jurors on this panel before coming to Court?

32. Have any of you heard, or do you have any knowledge of the facts or events in this case?

33. Do all of you understand that you are not allowed to conduct any type of investigation of this case on your own?

34. Because of the nature of the charge and the evidence in this case it may be necessary for you to listen to some language or some testimony which you would ordinarily not here or use in polite conversation. Would that bother you?

35. In light of the fact that this is a murder case, is there anyone that would be unable to listen to the testimony and look at the evidence, knowing that this case involves a homicide?

36. Does the fact that the defendant in this case is a black man, by itself, have any significance to any of the jurors?

37. Is there anyone that feels that ethnicity is a factor to be considered in this case?

38. The defendant in this case is charged with the crime of Murder. This is a serious offense. Do any of you have any sympathy or pity for the defendant because he is charged with this crime? Can you put aside such feelings and judge the defendant only upon the evidence presented to you?

39. Do all of you understand that the evidence presented by the defendant is not entitled to anymore weight just because he is accused of a crime?

40. Do all of you understand that if the defendant chooses to testify in this case, that his testimony is not entitled to anymore weight than the testimony of any other witness solely because he is charged with a crime?

41. In taking the stand, the defendant will have to take an oath like every other witness who testifies. Is there anyone who believes that when the defendant takes the stand, if he does, and swears to tell the truth, that it means that he is going to tell the truth?

42. Is there anyone on the prospective jury panel that believes that the defendant's testimony is more likely to be accurate than any other witness just because he is the accused?

43. Does everyone agree that the defendant's testimony should not be given anymore weight or credibility just because he is the defendant?

44. Does everyone understand that in a trial, the jurors decide the facts, and the Judge makes the decision as to what is the applicable law. At the end of the case, the Judge will then instruct you as to the law. Do each of you agree to follow the law that is given to you by the Judge?

45. If you hear any instruction which you believe should not be the law, will you still follow it and disregard your own opinion as to what you believe the law should be?

46. Do you believe that you will have any problems or any difficulty in following the law which you do not believe should be the law?

47. Is there anyone who, if they are in disagreement with some of the laws given to them by the Court, could still not follow them?

48. Does the nature of the charge itself or the possibility that some evidence may be gruesome in nature cause any of you to feel that you would rather not sit on this case?

49. In this case, the defendant is charged with Murder. The evidence will show that he did not commit the crime by himself. The State has alleged four different theories of liability of culpability. The State has alleged that the defendant either shot the victim and caused the murder, or that the defendant conspired with other individuals to commit a robbery and that Branson Clark was killed during the course and in furtherance of the robbery, or that the defendant aided and abetted others in the commission of the robbery and murder, and finally, the State claims that the defendant is guilty of Murder by virtue of the Felony Murder Rule. The Felony Murder Rule provides that if a person is killed during the course of the commission of a felony, the person is also liable for the murder. Does everyone understand that you may find the defendant guilty under any one of the four theories alleged by the State? Do all of you understand that the jury need not be unanimous with respect to the theory of guilt, but only as to the question as to whether or not the defendant is guilty beyond a reasonable doubt of the crimes alleged in the Information? Does everyone understand that the law provides that all persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or with knowledge of the unlawful purpose of the crime aid and abet in its commission or, whether present or not, who advised and encouraged its commission are regarded by the law to be equally guilty? Does anyone have an opinion about the law which provides that one is guilty of a crime who is not the actual perpetrator if he merely advised, encouraged or assisted in the commission of the crime?

50. Would any of you have any hesitancy in following an instruction, which, as a matter of law told you that one who knowingly commits an act that promotes, encourages or aids the commission of a crime is guilty of that crime even though he did not know that the act encouraged was unlawful, was not present when the act was committed, and did not know that the act was committed?

51. Do any members of the prospective panel have any disagreement with the concept that each conspirator in a conspiracy is liable for the acts of his co-conspirators which were committed in furtherance of the object of the conspiracy, even if such acts were not originally intended, provided that these acts are the natural and probable consequence of the object of the conspiracy?

52. Would you be able to follow the rule which I just stated even if it required that you convict the defendant for crimes which were committed by another person, which the defendant did not

intend to commit, did not agree to or know were to be committed, and at whose commission he was not present?

53. Has any member of the prospective jury panel ever heard evidence described as being either direct or circumstantial?

54. Direct evidence is evidence which directly proves a fact without an inference. For example, you do not need an inference to know that I am now standing in front of you. Your view of me is direct evidence that I am in this courtroom.

Circumstantial evidence is evidence which proves a fact from which an inference of the existence of another fact may be drawn.

55. Do each of you realize that in a trial direct evidence and circumstantial evidence are entitled to equal weight? Do each of you realize that it is not necessary that facts be proved by direct evidence and that the defendant may be convicted by only circumstantial evidence? Do you feel that you could convict the defendant on only circumstantial evidence?

56. All of the defendants are not on trial in this proceeding. Do you promise that you will not speculate about the reason for the absence of any other defendants?

57. Do all of you promise to give the defendant a fair trial? Do all of you understand that the State, as well as the defendant, also has the right to a fair trial? Do all of you feel that you can be fair to both the defendant and the State of Nevada?

58. In deliberating in the jury room and applying the burden of proof, which is that the State proved the defendant guilty beyond a reasonable doubt, will you apply your common sense to determining that issue?

59. Do all of you understand that you may use your experience in every day affairs in evaluating the truthfulness of witnesses and the weight of the evidence which you will hear in the trial?

60. In this case, the defendant may take the stand and testify as to certain facts. Do you understand that if the defendant does testify, that his testimony by itself does not create a reasonable doubt?

61. Is there anyone on the jury who believes that the presentation of conflicting evidence by the defendant creates a reasonable doubt without having to evaluate the weight of that evidence?

62. Do all of you understand that a conflict in the evidence does not necessarily create a reasonable doubt?

63. Is there any reason which we have not covered in voir dire which would affect your ability to be fair and impartial to both sides?

64. Are there any questions that any of you can think of that I might have forgotten to ask which might be relevant to whether you can be a fair and impartial juror?

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Voir Dire – Scope

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION
FOR BROAD QUESTIONING
OF JURY PANEL

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Chief Deputy District Attorney, and offers its Opposition to Defendant's Motion for Broad Questioning of Jury Panel.

This Opposition is based upon the following Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

DISCUSSION

NRS 175.031 provides that:

> The court shall conduct the initial examination of prospective jurors, and defendant or his attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted.

The scope of jury voir dire is within the sound discretion of the trial court. The trial court's determination will be given considerable deference by a reviewing Court. Witter v. State, 112 Nev. 908, 914 (1996); Cunningham v. State, 94 Nev. 128 (1978). The critical concern in every jury voir dire process is to discover whether a juror "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526 (1980), cited with approval in Witter, Id.

This Court has traditionally given lawyers a wide range of latitude in questioning prospective jurors. The State is confident that this Court's traditional method of voir dire satisfies the dictates of Adams and Witter, supra. In an age where potential jurors are expressing more and more displeasure with the criminal justice system in general, and the criminal jury trial process in particular, the State believes it would be a bad idea to further anger perspective jurors by having them subjected to extraordinarily lengthy voir dire.

The parties can obtain a fair and impartial jury without resorting to the extremely time consuming process of overly broad voir dire or individualized sequestered voir dire. NRS 175.031; Cunningham v. State, 94 Nev. 128 (1978); Witter v. State, 112 Nev. 908, 914 (1996); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 2526 (1980).

CONCLUSION

This is not a capital case. Although certain factual issues will be in dispute at trial, this is not a complex case. Neither the victims nor the defendant are well known in the community. From a juror perspective, there is nothing that sets this case apart from other non-capital cases. The jury should not be forced to submit to an extraordinarily lengthy voir dire process.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Chief Deputy District Attorney

Voir Dire Sequestered Jury Questionnaire

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

Voluntary Consent To Search

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

In Passama v. State, the Nevada Supreme Court examined the issue of voluntariness of confessions, and set forth a list of factors that the trial court should consider.

> To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. See Schneckloth v. Bustamonte, 412 U.S. 218, 226-227 (1973). The question in each case is whether the defendant's will was overborne when he confessed. Id., at 225-226. Factors to be considered include: The youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep. Passama, supra, at page 214.

A confession is not rendered involuntary simply because the suspect has consumed alcohol or become intoxicated. U.S. v. Pelton, 835 F.2d 1067 (4th Cir., 1987), cert. denied, 108 S.Ct. 1741 (1988).

CONCLUSION

Based upon the foregoing, the State respectfully requests that the Motion to Suppress be denied. The State has no objection to the defendant's request that a Jackson v. Denno hearing be set in this matter.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Waiver of Prelim Knowing and Intelligent

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

> NRS 171.208 states that:
> If a preliminary examination has not been had and the defendant has not unconditionally waived the examination, the district court may for good cause shown at any time before a plea has been entered or an indictment found remand the defendant for preliminary examination to the appropriate justice of the peace or other magistrate, and the justice or other magistrate shall then proceed with the preliminary examination as provided in this chapter.

The courts have held that the absence of a preliminary examination or the absence of an intelligent waiver of a preliminary examination may be called the attention of the district court at any time prior to the entry of plea. The defense has made such a motion before this court.

The trial court may exercise it's discretion as to what constitutes good cause. If a court fails to consider the defendant's motion for remand or improperly denies such motion, the Supreme Court held that the defendant's subsequent plea of not guilty on the arraignment does not act to waive his right to preliminary examination.

The case law does not clarify what test the court should apply to find "good cause." In Fleming v. Sheriff, Clark County (Nev.1979) 95 Nev. 452, 596 P.2d 243, the Defendant made a plea bargain with the State in which he offered to plead guilty to one count of sexual assault and in exchange the State offered to dismiss two counts. But after the waiver, the defendant was informed by new counsel that he was ineligible for probation. The defendant did not know the consequences of his plea bargain at the time that he made it. Therefore, he requested the matter be remanded. The court denied his motion. Then the defendant pled not guilty.

The court held that "we believe that where, as here, preliminary examination is waived as a condition of an aborted plea bargain, "good cause" as contemplated by NRS 171.208 exists." The ruling does not explain why good cause was found. Was the court's decision was based on the fact that the defendant didn't understand the consequences of the plea bargain? The reasoning is not stated. The court

may have been making a statement of black letter law - that anytime before plea is taken, a defendant is entitled to remand for preliminary hearing. If so, then the court must remand the case to justice court.

In Sturrock v. State,95 Nev. 938, 604 P.2d 341(Nev. 1979), the court refused to let a defendant plead not guilty in district court after he refused a plea bargain in district court. The defendant was not further advised of his rights pursuant to NRS 171.196 granting him a preliminary examination. The high court stated, "But, when such an agreement is not consummated, the validity of the waiver is vitiated, and it is incumbent upon the district court to absolve appellant of the adverse consequences of the aborted plea bargain.(citations) The court was thus obligated to inform appellant of his right to a preliminary examination before permitting him to enter a plea." The effect of the district court's error was that appellant forfeited his opportunity to exercise the statutory right to a preliminary examination. The court further held that appellant had a clear right to a preliminary hearing, and that the failure of the defense counsel to seek extraordinary relief via a writ and was deemed to have waived his objection to the error.

Due to the fact that an aborted plea bargain is the basis upon which the defendant is seeking remand, it does not appear that good cause exists in this case to deny remand to the defendant. Therefore, the State has stipulated for remand in this case.

II.

CONCLUSION

Therefore based on the facts and the law in this case, the State concurs in the Defense's request for remand.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Weapon Dangerous Finding of Fact Jury

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Essentially, the defendant argues that both NRS 193.165 and Buff and Pacheco v. State, 114 Nev.Adv.Op. 131 (Dec. 8, 1998) preclude the State from seeking such an enhancement under the facts of this case. The defendant's argument is misplaced.

NRS 193.165(5)(b) specifically provides that a deadly weapon is "Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily of causing substantial bodily harm or death..." (emphasis added). This language has been further interpreted by the Nevada Supreme Court in Stroup v. State, 110 Nev. 525, 874 P.2d 769 (1994). There, the Court noted that "...some weapons can be determined as a matter of law to be inherently dangerous...." However, "...[i]f it is not clear whether the weapon is deadly, the jury must then determine that issue in addition to whether the weapon was used to commit the crime." Id. at 577, 798 P.2d at 551-52.

CONCLUSION

Whether or not the defendant used a deadly weapon in the commission of this crime is a question of fact for the jury. Accordingly, the Court should deny the defendant's motion to strike and/or preclude a deadly weapon enhancement allegation.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Weapon Inherently Dangerous Pellet Gun

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The sentence enhancement for the use of a "firearm or other deadly weapon" in the commission of a crime is governed by NRS 193.165. In Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990), our court analyzed NRS 193.165 and substituted the more narrow "inherently dangerous weapon" test in place of the "functional test" to define the term "deadly weapon."[37] The Nevada Supreme court held that "...some weapons can be determined as a matter of law to be inherently dangerous, and thus the only question remaining for the trier of fact is whether the deadly weapon was used in the commission of the crime". Stroup v. State, 110 Nev. 525, 874 P.2d 769 (1994), citing Zgombic, supra, 106 Nev. at 577.

First, the charge as pled in the Information provided the defendant with the requisite notice that a deadly weapon was used in the commission of the murder. The purpose of pleadings is to provide an accused with notice of the charges against him of sufficient specificity to enable him to defend against them. In Hale v. Burkhardt, 104 Nev. 632, 764 P.2d 866 (1988), our court held that the criminal acts that the defendant is charged to have committed, contain a sufficiently 'plain, concise and definite' statement of the essential facts such that it would provide a person of ordinary understanding with notice of the charges." Id at 638.

Here, the defendant was advised that a deadly weapon enhancement was being sought by virtue of the statutory notice in the heading of the charge (NRS 193.165), as well as in the body of the

---

[37]"Inherently dangerous means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction will, or is likely to, cause a life-threatening injury or death." Zgombic, supra. The former functional test was reinstituted by the Nevada Legislature which redrafted NRS 193.165. It was signed into law on October 1, 1995 as former Assembly Bill 624. Therefore, the controlling law for the offense committed here on August 21, 1994 is the inherently dangerous weapon test.

charge text ("... by shooting and/or beating in the head"). This is sufficient to provide a person of ordinary understanding that the murder weapon was a gun. A gun is a deadly weapon as a matter of law. NRS 193.165. The jury was provided with the expert testimony of Forensic Pathologist Ellen Clark, M.D. and Coroner Vernon McCarty. Both Dr. Clark and Mr. McCarty opined that the trauma to the head was most consistent with a gunshot wound to the head; primarily due to the radiating fractures and an absence of bone consistent with a bullet track through the skull. Further, the jury made a specific finding that a deadly weapon (a gun) was used in the murder and further, the mechanism was by firing the gun's projectile into the victim's skull.[38] This court heard, considered and denied the defense's oral motion to strike the deadly weapon at the conclusion of the State's case. The defendant's contention has no more merit now that the jurors have unanimously agreed a

deadly weapon was used by the defendant to kill Renee Bendus. Stroup, supra, 110 Nev. at 528.

Second, the State and defense jointly agreed upon the submission to the jury of Instruction 34, the law of Zgombic, supra. Further, no objection was subsequently made by the defense at the settlement of instructions.[39]

CONCLUSION

For the reasons above, the State respectfully requests that this court deny the defendant's motion to strike deadly weapon enhancement.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

---

[38]As opposed to the weapon being used as a club or other manner inconsistent with the inherent purpose and design of a gun.

[39]The court will recall that the original verdict form submitted by the State was revised at defense request. Specifically, the defense requested, without objection that page two include the text: "If your answer is yes please identify the weapon and describe the manner of its use." The jury replied: "The weapon was a gun. The manner was a gunshot to the head."

By_____
Deputy District Attorney

Weapon Deadly Functional Test

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS; AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The "Functional Test" Applies to Deciding Whether A Weapon Is Deadly When Alleged As An Element Of An Offense; Hence, A Cue Ball Is A Deadly Weapon When Alleged As An Element Of Battery With A Deadly Weapon.

Defendant mistakenly cites several cases for the proposition that the "inherently dangerous" test applies to deciding whether a weapon is deadly when alleged as an element of an offense. See Kazalyn v. State, 108 Nev. 67, 76 (1992); Smith v. State, 110 Nev. 1094, 1102 (1994); Hutchings v. State, 110 Nev. 103, 111 (1994). In fact, these cases stand for the principle that the "inherently dangerous" test applies to deciding whether a weapon is deadly for purposes of sentence enhancement pursuant to NRS 193.165.

> NRS 193.165 provides in pertinent part as follows:
>
> (1) . . . any person who uses a firearm or other deadly weapon . . . in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime . . .
>
> (2) This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.
>
> (3) The provisions of subsections 1 and 2 do not apply where the use of a firearm, other deadly weapon or tear gas is a necessary element of such crime. [Emphasis added].
>
> (5) As used in this section, "deadly weapon" means:
>
> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
>
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death . . .

NRS 193.165 changes the rule of law set forth in Zgombic v. State, 106 Nev. 571 (1990), as it pertains to defining deadly weapons for the purposes of sentence enhancement. In Zgombic, 106 Nev. at 573-74, the Supreme Court overruled the decision in Clem v. State, 104 Nev. 351 (1988), only as it pertained to using the "functional test" for the purpose of sentencing enhancement.[40] However, the Supreme Court stated as follows:

> In Clem, we cited several cases in support of the functional test. Some of these cases dealt with the interpretation of a deadly weapon clause in a statute where a deadly weapon was an element of a crime, such as assault with a deadly weapon (fn.2). We have no dispute with these cases which use the functional test to define a deadly weapon when a deadly weapon is an element of a crime. Indeed, that is the interpretation generally followed in Nevada. See Loretta v. Sheriff, 93 Nev. 344, 565 P.2d 1008 (1977). Whether the same functional test applies for purposes of sentence enhancement is a different question, however. Upon reflection, we conclude that interpreting the deadly weapon clause in NRS 193.165 by means of a functional test was not what our legislature intended or what is mandated by statutory rules of construction. Accordingly, we overrule the functional test stated in Clem and substitute the "inherently dangerous weapon" test to determine whether an instrumentality is a deadly weapon pursuant to NRS 193.165.[41] [Emphasis added].

Clearly, when the Nevada legislature decided to change the rule of law set forth in Zgombic, supra, 106 Nev. 571, it chose to apply both the "functional test" and the "inherently dangerous weapon" test for the purposes of sentence enhancement pursuant to NRS 193.165. However, the rule of law in Zgombic, supra, 106 Nev. at 573-74, which requires courts to apply the "functional test" when determining whether a weapon is deadly if a deadly weapon is alleged as an element of a crime, remains the controlling law in Nevada.

---

[40] Under the "functional test," an instrumentality, even though not normally dangerous, is a deadly weapon whenever it is used in a deadly manner. See Zgombic, supra, 106 Nev. at 574-75; see also NRS 193.165(5)(b).

[41] A weapon is inherently dangerous when "the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will, or is likely to, cause life-threatening injury or death." Zgombic, supra, 106 Nev. at 576-77; see also NRS 193.165(5)(a).

In the case at hand, Wolfe struck Mr. Swing in the head repeatedly with a cue ball. Under the "functional test," a cue ball is an instrumentality, although not normally dangerous, which is a deadly weapon when used as a blunt instrument to repeatedly strike a victim on the head. Clearly, repeated blows to Mr. Swing's head with a solid cue ball could have likely caused a life-threatening injury.

In Archie v. Sheriff, 95 Nev. 182 (1979), the Supreme Court upheld the District Court's determination that the defendant probably committed a battery with the use of a deadly weapon -- a two-by-four piece of lumber. In Anthony Lee R. v. State, 952 P.2d 1 (1997), the Nevada Supreme Court upheld a juvenile court's decision that a charge of battery with a deadly weapon -- a baseball bat -- had prosecutorial merit. Hence, both a piece of lumber and a baseball bat are deadly weapons for the purposes of alleging an element of a crime.

In the case at hand, both a piece of lumber and a baseball bat are similar and analogous to a cue ball in that they are both likely to cause life-threatening injury when used as a blunt instrument to inflict injury on a person's vital areas, i.e., the head. Thus, a cue ball is a deadly weapon for the purposes of alleging battery with a deadly weapon.

Wolfe cites Sheriff v. Gillock, 112 Nev. 213 (1996) for the proposition that the Nevada Supreme Court applied the "inherently dangerous weapon" test when deciding whether a weapon is deadly when alleged as an element of a crime. In Gillock, supra, 112 Nev. 213, the defendant hit an individual with a drinking water glass on the face. Wolfe's interpretation of the decision in Gillock, supra, 112 Nev. 213, is misplaced.

The Supreme Court held that "[t]he state has not shown that the district court erred in finding that a water glass is not a deadly weapon and that the state therefore did not present sufficient evidence to the grand jury to establish probable cause that respondent [defendant] committed a battery with the use of a deadly weapon." Gillock, supra, 112 Nev. at ___, 912 P.2d at 275-76. Thus, the Supreme Court did not rule that a drinking glass is not a deadly weapon when alleged as an element of a crime -- it only upheld the District Court's decision that the state failed to present sufficient evidence to the grand jury on the deadly weapon issue. Furthermore, the issues before the Supreme Court did not require it to apply

either the "functional test," or the "inherently dangerous weapon" test, as Wolfe incorrectly asserts in his Petition for Writ of Habeas Corpus.

The "inherently dangerous weapon" test does not apply in this case since the cue ball is alleged as an element of battery with a deadly weapon -- not as a sentence enhancement. Since the State presented sufficient evidence to the grand jury that the offense of battery with a deadly weapon -- a cue ball -- Wolfe's Petition for Writ of Habeas Corpus must be denied

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Weapon Deadly Inoperative

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION

OF FOR

A WRIT OF HABEAS CORPUS.

OPPOSITION TO WRIT

OF HABEAS CORPUS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Putting aside the argument stated above, the evidence presented at the preliminary hearing clearly establishes independent evidence of the use of a firearm. As the petition concedes, the witnesses identified the presence of a handgun. Petitioner cites McIntyre v. State, 104 Nev. 622, 764 P.2d 482 (1988), as authority of the requirement to prove the deadly capabilities of a weapon. In fact, McIntyre merely stands for the proposition that a toy gun is not a deadly weapon for purposes of NRS 193.165. McIntyre does not stand for the proposition that a witness must: (1) See the entirety of the weapon, or (2) know its deadly capabilities. The court held,

> We have previously determined that in statutorily distinguishing firearms from 'other deadly weapons,' the legislature, for purposes of sentence enhancement, attributed a firearm a per se deadly status; proof of a firearm's deadly capabilities is not required. We have applied this rational in cases involving blank guns, and firearms which are, in fact, inoperable. McIntyre at 622. (Citations omitted).

In fact, the Nevada Supreme Court addressed a scenario wherein the defendant used an inoperative pistol. In upholding the deadly weapons enhancement, the court stated,

> In order to 'use' a deadly weapon for purposes of NRS 193.165, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime. Culverson v. State, 95 Nev. 433, 596 P.2d 220 (1979). The jury could have found from the evidence presented that the appellant 'used' the pistol in the commission of the robbery, even though inoperative, and that his use of the pistol produced a fear of harm or force in the victims. A firearm is dangerous, not only because it can inflict deadly harm, but because its use may provoke a deadly reaction from the victim or from bystanders. Allen v. State, 96 Nev. 334, 609 P.2d 321 (1980).

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____

Deputy District Attorney

Withdrawal of Guilty Plea

CODE 2395
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TO QUASH SERVICE OF PROCESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and moves this Honorable Court for an Order quashing the Subpoena Duces Tecum served on , . This motion to quash is based upon Points and Authorities, attached hereto and incorporated herein.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The State now moves to quash the subpoena based upon "work product" doctrine and NRS 174.235(2).

> NRS 174.235(2) provides in pertinent:
> The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
> (a) An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case.
> (b) A statement, report, book, paper, document, tangible object or any other type of item or information that is privilege or projected from disclosure or inspection pursuant to the constitution or laws of this state or the constitution of the United States.

The State contends that the memorandum prepared by regarding his interview with is privileged pursuant to the statute and work product rule. See, Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997). There, the court held that Nevada's discovery statute (at that time NRS 174.245(1)), does not limit non-discoverable documents only to "theories, conclusions, or opinions." Nevada discovery statute is broader in that the subsection does not authorize the discovery or inspection of reports, memorandum or other internal state documents made by state agents in connection with the investigation or prosecution of the case. Id.

In Lisle, the Nevada Supreme Court held that notes taped during an interview of a witness prepared in anticipation of litigation were attorney work product and, therefore, not discoverable. Citing, State v. Nobles, 422 U.S. 225 (1975).

Further, the State and the defense entered into a discovery stipulation whereby work product was specifically excluded from the materials discoverable in the case. Therefore, the Subpoena Duces Tecum should be quashed.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Willful Endangerment Child

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

STATE'S RESPONSE TO DEFENSE MOTION TO DISMISS

I.

STATEMENT OF THE FACTS

ARGUMENT

WILLFUL ENDANGERMENT DOES NOT REQUIRE A CHILD ACTUALLY SUFFER HARM.

NRS 200.508 divides child neglect into two separate crimes, one a gross misdemeanor, the other a felony, and defines the offense in terms of two different kinds of conduct. One crime is committed under NRS 200.508(1)(a)) by a person who actively "causes a child" to suffer unjustifiable pain; the other crime is committed under NRS 200.508(1)(b)) by a person who passively "permits or allows" a child to suffer unjustifiable pain or to be placed in a situation where the child "may suffer" pain. Rice v. State, 113 Nev. 1300,949 P.2d 262, (Nev. 1997)

The relevant portions of NRS 200.508 state that criminal liability will be found for 1. A person who:

> (a) Willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect; or (b) Is responsible for the safety or welfare of a child and who permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect.

NRS 200.508(3) defines several of the terms used in NRS 200.508(1)(a) and (b) as follows:

> As used in this section:
>
> (a) "Abuse or neglect" means ... negligent treatment or maltreatment of a child under the age of 18 years, as set forth in NRS 432B.140 ..., under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.
> b) "Allow" means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that the child is abused or neglected.
> (c) "Permit" means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care, custody and control of a minor child.

In Smith, the court held that the child neglect statutes, NRS 200.508(1)(a) and NRS 200.508(1)(b), "when read as a whole ... require knowledge or intent on the part of the actor as a prerequisite to finding guilt." The court held that the "statutory definitions of 'allow' and 'permit' ... are not drafted as clearly as would be preferred, but they do establish with sufficient clarity the state of mind required to find guilt." Smith defines "permit" so as to require that "a violator must act in a way that 'a reasonable person' would not."

In this way, Smith clarified the statutory "requirement of knowledge and reasonableness" which "defines the state of mind required for a finding of guilt and effectively precludes punishment for inadvertent and ignorant acts."

Additionally, the "situation" which the child must be "placed in" is clearly defined by the remainder of the statute which states that the child must be placed in a situation where it "may suffer physical pain or mental suffering as the result of abuse or neglect."

In Hughes v. State, 112 Nev. 84, 910 P.2d 254 (Nev. 1996), the court held that potentially exposing a child to possible harm based on criminal activity is child neglect, even though the events which could expose the child to harm never occur. The facts involved a defendant transporting his daughter in a stolen car. In Hughes, Officer Curry explained police officer procedure upon encountering a person in possession of a stolen vehicle. The court found the testimony admissible to prove endangerment of a child.

In Hughes, no felony car stop actually occurred. But the court upheld the admission of Officer Curry's testimony to establish that the transportation of a child in a stolen vehicle places that child in a situation where he or she may suffer physical pain or mental suffering. Therefore, the possibility of harm is all that is needed for a violation of NRS 200.508. There is no requirement that the harm feared occur, or even be reasonably certain to occur.

Of interest here is that Officer Curry's testimony was the only evidence presented at trial to support a conviction of child endangerment. In particular, appellant's daughter testified that she was a passenger in a stolen vehicle on a number of occasions and was present when her father stole the keys to a second vehicle off a grocery cart. The court ruled that the jury could reasonably infer from the evidence presented that by involving his daughter in such criminal activities, appellant caused her to suffer unjustifiable mental suffering as a result of neglect or placed her in a situation where she may suffer physical pain or mental suffering as the result of neglect.

Smith defines "permit" so as to require that "a violator must act in a way that 'a reasonable person' would not." A reasonable person would not abandon her infant in this matter, or attempt to resume it's care when so intoxicated. A "reasonable person" makes proper arrangements for the care of a child. Failure to do so potentially subjects the child to a situation where its safety and welfare is endangered.

NRS 432B.140 states:

"Negligent treatment or maltreatment of a child occurs if a child has been abandoned, is without proper care, control and supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for his welfare or his neglect or refusal to provide them when able to do so.

CONCLUSION

Therefore, based on the foregoing facts and law, the State respectfully requests that the defendant's motion to dismiss be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Witness Material Application for Appearance Out-of-State

CODE 1270
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

APPLICATION

COMES NOW the State of Nevada, by and through , Deputy District Attorney of Washoe County, Nevada, and respectfully applies to the Court as follows:

That is residing in the City of , County of , State of . That the State of by its laws has made provisions for requiring persons within its border to appear in a criminal prosecution commenced in the State of Nevada, and that the said is a material witness in the above-entitled case for the following reasons:

This witness is material and necessary because he can testify regarding the whereabouts, activities and motivations of the principal actors before, during and after a double homicide. In particular, this witness can help establish the sequence of events preceding and following the killings; and/or the source and history of one of the murder weapons; and/or the principal occupation of , whose connection with Trafficking in Controlled Substances provides substantial motivation for the killings.

That the said is required at the jury trial of the above-entitled case, which is scheduled to commence on , , at the hour of a.m. Testimony of the above named witness is material and his presence is required and necessary on , , at the hour of p.m., and it will not cause undue hardship to compel the witness to appear and testify in the prosecution of the case which is a criminal prosecution.

WHEREFORE, your applicant prays for an Order of the above-entitled Court that a certificate issue under the seal of this Court, stating the facts specified herein and specifying that the witness shall be required three days for testifying and one day for travel; and that the said certificate shall be presented to the Judge of the Court of record in the County of which the witness is found, to wit: County, State of , and that, in the event said witness is summoned to attend and testify in Nevada as set forth in this Application, he shall be tendered the sum of $25.00 per day for each day he is required to travel and attend as a witness, which will be four days, and a round trip airline ticket, and for such other and further relief as to this Court seems just and equitable.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____
Deputy District Attorney

STATE OF NEVADA)
: ss.
COUNTY OF WASHOE)

I, , do hereby swear under penalty of perjury that the assertions of this affidavit are true.

That I am a duly appointed, qualified and acting Deputy District Attorney of the County of Washoe, State of Nevada, and that I am the applicant in the above-entitled matter, and that the foregoing Application is true as I verily believe.

Submitted and sworn to before me this

___ day of _____, .

AMY HARVEY
County Clerk of the County
of Washoe, State of Nevada

Clerk
CODE 1340
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

CRIMINAL CERTIFICATION UNIFORM ACT TO SECURE
THE ATTENDANCE OF WITNESSES FROM WITHOUT
THE STATE IN CRIMINAL CASES (NRS Sec. 174.425)

THE STATE OF NEVADA, TO: JUDGE OF THE DISTRICT COURT OF THE FIRST

JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER:

As Judge of the Second Judicial District Court for the State of Nevada, a court of record for the State of Nevada, which state has adopted the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, I do hereby certify that there is pending a criminal prosecution within this State and that , who resides at , is a person within the County of , State of ; and is a

material witness in such proceeding and that his presence will be required for three days before the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on December 13, 1999, at the hour of 9:00 a.m. I further certify that one day for travel time will be necessary for such attendance.

The State of Nevada will grant all rights, privileges and immunities specified in the Uniform Act to Secure the Attendance of Witnesses from Without the State of Nevada in criminal cases as provided in the Nevada Revised Statute, Section 174.435.

It is requested that as Judge of the District Court of the First Judicial District of the State of Idaho, in the County of Bonner, which state has adopted the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, you hold a hearing and issue a summons directing the attendance of who resides at , , , at the time and place above indicated, in accordance with the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases.

Attached to this certificate is a prepaid round trip airline ticket from , , to Reno, Nevada, and back, and a check for the sum of $. This is to cover $25.00 per day for each of the one day of travel and days of testimony; twenty-five cents ($.25) per mile for each of the miles which will be required to travel to and from the Spokane Airport, plus $10.00 to cover taxi fare from the Reno/Tahoe International Airport to the Washoe County Courthouse. In the event that you issue a summons to , directing his attendance at the above-mentioned jury trial, the warrant should be tendered to him.

DATED this ___ day of _____, .

DISTRICT JUDGE

CERTIFICATE OF COUNTY CLERK

I, AMY HARVEY, on the date hereof, County Clerk of the County of Washoe, State of Nevada, and Clerk of the Second Judicial District Court for the State of Nevada, do hereby certify that JANET BERRY is on the date hereof a Judge of the Second Judicial District Court of said State (which is a court of record having a seal), and full faith and credit are due her official acts as such; that I have examined the handwriting of the above named Judge and do verily believe the signature affixed to said instrument is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Second Judicial District Court of the State of Nevada, this ___ day of _____, .

AMY HARVEY, County Clerk of the County of Washoe, State of Nevada, and Clerk of the Second Judicial District Court of the State of Nevada

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF , IN AND FOR THE COUNTY OF

IN THE MATTER OF THE REQUEST OF
THE STATE OF NEVADA FOR THE
APPEARANCE OF IN
A CASE ENTITLED "STATE OF NEVADA,
Plaintiff, vs. ,
Defendant."
_____/

S U M M O N S

THE PEOPLE OF THE STATE OF

TO:

GREETINGS:

IT APPEARING to the Court that is a material and necessary witness in the above-entitled prosecution and that it will not cause undue hardship for the said witness to be compelled to attend and testify therein; that the necessary statutory fees have been tendered,

YOU ARE HEREBY COMMANDED to appear before the Second Judicial District Court of the State of Nevada, at the Washoe County Courthouse, in the City of Reno, on , , at the hour of a.m., as a witness on behalf of the State of Nevada in the case wherein is charged with COUNTS I and II: WE , violations of NRS , NRS and NRS , both felonies.

FAIL NOT AT YOUR PERIL.

DATED this ___ day of _____, 19__.

_____
JUDGE OF THE ABOVE-SAID COURT

CLERK'S ATTESTATION:

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF , IN AND FOR THE COUNTY OF

IN THE MATTER OF THE REQUEST OF
THE STATE OF NEVADA FOR THE
APPEARANCE OF IN
A CASE ENTITLED " ,
Plaintiff, vs. ,
Defendant."
_____/

O R D E R

THIS MATTER came before the District Court of the First Judicial District of the State of , in and for the County of , upon the certification of the Judge of the Second Judicial District Court of the State of Nevada, and

IT APPEARS to the Court that the provisions of the statutes of the State of require witnesses within the State of to attend and testify in the State of Nevada; and

IT FURTHER APPEARS that there is a criminal prosecution pending in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, entitled, "THE STATE OF NEVADA, Plaintiff, v. , Defendant," and that is a material and necessary witness in such prosecution; and that his presence will be required for a period of three days of testimony and one day of travel for the jury trial of said case, which commences on , at the hour of a.m.

IT IS THEREFORE ORDERED AND ADJUDGED that the ___ day of _____, in the courtroom of the DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF , IN AND FOR THE COUNTY OF shall be fixed as the time and place for this matter and is hereby directed to appear at the said time and place for the hearing.

DATED this ___ day of _____, 19__.

_____
JUDGE OF THE ABOVE SAID COURT

R E T U R N

I, _____ hereby certify that I received the within Order on the ___ day of _____, , and served the same upon _____ at _____.

DATED this ___ day of _____, .

June 9, 2003

Bonner County D.A.'s Office
Attn: Kinda
2101 West Pine St
Sandpoint, Idaho 83864

Re: State of Nevada v.

Dear Kinda:

Enclosed please find the necessary documents for out-of-state process on witnesses in criminal cases as required by the Uniform Act To Secure The Attendance Of Witnesses From Without The State In Criminal Cases. I believe you will find the documents in order.

Our information would indicate that Michael Kirby is currently residing at 875 Elk Grove Road, Sandpoint, Idaho. He will attempt to avoid service.

This witness is material and necessary because he can testify regarding the whereabouts, activities and motivations of the principal actors before, during and after a double homicide. In particular, this witness can help establish the sequence of events preceding and following the killings; and/or the source and history of one of the murder weapons; and/or the principal occupation of Bobby Jehu Stroup, whose connection with Trafficking in Controlled Substances provides substantial motivation for the killings.

If you have any questions concerning the above, or encounter any difficulties in perfecting this service, please do not hesitate to contact this office.

Thank you for your assistance in this matter.

Sincerely yours,

RICHARD A.

GAMMICK

District Attorney

By
Deputy District Attorney

Encl.

Witness Child Competency

CODE
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION TO DETERMINE COMPETENCY OF CHILD WITNESSES

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The standard of competence for child witnesses is that the child must have the capacity to receive just impressions and possess the ability to relate those impressions truthfully. Lanoue v. State, 99 Nev. 305, 307 (1983); Wilson v. State, 96 Nev. 422, 423 (1980). The determination of competence is left to the sound discretion of District Court and will not be disturbed on appeal absent a clear abuse of discretion. Wilson, Id.; Terrible v. State, 78 Nev. 159, 160 (1962). A reviewing court examining the issue of competency is not limited solely to the competency voir dire examination of the child, but may also look to the substantive testimony regarding the crimes in question given by the child at the preliminary hearing and trial. Wilson, Id.; Terrible, Id.; Lanoue, Id.

Although a trial court must evaluate a child's competency on a case-by-case basis, some relevant factors to be considered include: (1) The child's ability to receive and communicate information; (2) the spontaneity of the child's statements; (3) indications of "coaching" and "rehearsing"; (4) the child's ability to remember; (5) the child's ability to distinguish between truth and falsehood; and (6) the likelihood that the child will give inherently improbable or incoherent testimony. Felix v. State, 109 Nev. 151, 173 (1993).

As in every case, the prosecutor will request that a brief competency examination be held for each of the two child victims, prior to their being presented to the jury. Both girls had no trouble whatsoever answering the basic competency questions that were asked of them at the prior preliminary hearing.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Witness Notice

CODE
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

NOTICE OF WITNESSES PURSUANT TO NRS 174.234

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and offers this Notice of Witness given pursuant to NRS 174.234.

Witness Psychiatric Examination

CODE 2650
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

**OPPOSITION TO DEFENSE MOTION IN LIMINE:
STATE'S MOTION TO FORECLOSE IMPROPER
USE OF CHARACTER EVIDENCE, PREVENT UNLAWFUL
PSYCHIATRIC EVALUATION OF PROSECUTION WITNESSES**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and

, Deputy District Attorney, and submits its opposition to motions filed by defense counsel.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

Counsel has not stated whether her request to examine the parents is predicated on competency issues, or whether it is an attempt to attack credibility. In United States v. Jackson, 576 F.2d 46, 49 (5th Cir.1978) the court, in declining a request for the mental examination of prosecution witnesses observed that in addition to seriously impinging upon a witness' right to privacy, such an examination could also be used to harass, deter witnesses from coming forward and cause a chilling effect on the detection of crime. This is precisely what will happen in this case if the parents are forced to be "evaluated" by a defense psychologist.

The courts are virtually unanimous in holding that psychiatric testimony regarding the credibility of a witness will not be admissible. That view has been expressed in many ways. In United States v. Fountain, 840 F.2d 509, 517 (7th Cir.), cert. denied, 488 U.S. 982, 109 S.Ct. 533, 102 L.Ed.2d 564 (1988). The court refused to require a witness to submit to a psychiatric examination before testifying and made this observation:

> The district court was entitled to be leery of both psychiatric examinations of witnesses and psychiatric testimony about witnesses, because the jury can observe for itself ... the witness' behavior. Criminal trials are complex enough without turning them into collateral investigations of the witnesses -- investigations that would not only drag out trials and confuse jurors but also discourage people from serving as witnesses. 840 F.2d at 517.

In United States v. Eschweiler, 745 F.2d 435, 438 (7th Cir.1984), cert. denied, 469 U.S. 1214, 105 S.Ct. 1188, 84 L.Ed.2d 334 (1984) the court reaffirmed its reluctance to encumber criminal proceedings with psychiatric examinations of witnesses, a determination that the court previously made in United States v. Gutman, 725 F.2d 417, 420 (7th Cir.), cert. denied, 469 U.S. 880, 105 S.Ct. 244, 83 L.Ed.2d 183 (1984).

In United States v. Ramirez, 871 F.2d 582, 584 (6th Cir.), cert. denied, 493 U.S. 841, 110 S.Ct. 127, 107 L.Ed.2d 88 (1989) the court held that it cannot order a non-party witness to be examined by

a psychiatrist. At best, it could merely condition such witness' testimony on a prior examination. Citing and quoting from United States v. Gutman, supra, the court continued:

> The courts that have addressed the question agree, however, that the power not to allow a witness to testify unless he submits to a psychiatric examination should be exercised sparingly. (Citations omitted).

If the doors are opened to a battle of experts testifying as to a witnesses' credibility, there would be no end to the collateral consequences. There would be just as much reason to want such testimony as to an accomplice witness, an informer, or a witness who had cut a deal with the government as there would be to a drug user, or a parent who discovers his child has been molested or beaten. In this era of increasing use of experts in both civil and criminal trials, the sad truth is that an "expert" can be found to testify on behalf of almost any viewpoint or position. Wisely, the courts have historically left credibility determinations to the trier of fact, and counsel offers no compelling reason to depart from that procedure under the facts of this case.

In United States v. Gutman, supra, the court stated,

> We are reluctant to open the door to sanity hearings for witnesses.... It is unpleasant enough to have to testify in a public trial subject to cross-examination without also being asked to submit to a psychiatric examination the results of which will be spread on the record in open court to disqualify you, or at least to spice up your cross-examination.

In United States v. Barnard, 490 F.2d 907 (9th Cir.1973), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974), the defendants sought to introduce the testimony of a psychiatrist and a psychologist as to their opinions of a government witness' competency and reliability as a witness. The psychiatrist and the psychologist had read the Army psychiatric evaluation and the grand jury testimony of the witness and observed him during part of his testimony in court. On the basis of the foregoing, each had formed the opinion that the witness would lie if it were to his benefit to do so and was a sociopath. The trial judge did not permit that testimony. In affirming that ruling, the court said, at pages 912-13:

> As we have seen, competency is for the judge, not the jury. Credibility, however, is for the jury -- the jury is the lie detector in the courtroom. Judges frequently instruct juries about factors that the jury may or should consider in weighing the veracity of a witness. In this respect it can be said that judges assume that they have certain expertise in the matter, and that juries have less of that expertise than judges. It is now suggested that psychiatrists and psychologists have more of this expertise than either judges or juries,

> and that their opinions can be of value to both judges and juries in determining the veracity of witnesses. Perhaps. The effect of receiving such testimony, however, may be two-fold: first, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is a collateral but still an important matter. For these reasons we, like other courts that have considered the matter, are unwilling to say that when such testimony is offered, the judge must admit it.

It is established that cross-examination may be limited where the sixth amendment interest is outweighed by the danger of harassing witnesses or unduly prejudicing the jury. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The proper extent of cross-examination lies within the sound discretion of the trial court. Skinner v. Cardwell, 564 F.2d 1381, 1388-89 (9th Cir. 1977). The trial court may limit or even prohibit a proffered line of inquiry that is minimally relevant. Id. at 1389.

Counsel's cited cases deal with evaluation of sexual assault victims. The court's rationale for permitting such examinations of minor victims is substantially different than that required in cases where the defendant is seeking evaluation of nonvictim government witnesses. In Latham v. State, 790 P.2d 717 (Alaska App.1990), the target was an informant. In State v. Morant, 242 Conn. 666, 701 A.2d 1 (1997), the court considered whether the trial court should have permitted evaluation of an accomplice. In affirming the trial court's refusal, the appellate court stated: "Our case law demonstrates that the 'drastic measure' of ordering a psychiatric examination ... should be taken only upon 'compelling reasons.' " Ibid. 242 Conn. at 679, 701 A.2d 1.

In order to avoid victim harassment, the Alaskan court adopted a two-prong balancing test to reconcile the defendant's right to gather facts relevant to his defense with the sexual assault victim's constitutionally protected right to privacy. First, the defendant seeking a psychiatric examination of a prosecuting witness must make a specific showing of need for an evaluation by showing that the prosecuting witness may have specific mental or emotional problems directly related to the issues in the case. Second, the court requires the defendant to demonstrate that the testimony of the person to be examined is uncorroborated or otherwise untrustworthy. Pickens v. State, 675 P.2d 665,at 668-9, (Alaska App.1984). See also Moor v. State, 709 P.2d 498, 508 (Alaska App.1985).

Additionally, the United States Supreme Court has held that:

> The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting

unfavorable testimony. Pennsylvania v. Ritchie (1987), 480 U.S. 39, 53, 107 S.Ct. 989, 999, 94 L.Ed.2d 40, 54.

For all the above reasons, the court should deny the defense request.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Witness Statements Discovery

CODE 2645
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION FOR DISCOVERY AND PRODUCTION OF OTHER ITEMS AND INFORMATION

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this Opposition to the defendant's Motion for Discovery and Production of Other Items and Information and Other Relief. This Opposition is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant has moved this Honorable Court for a order for further discovery beyond that ordered on October 4, 1999.

I. DEFENDANT'S STATEMENTS.

Defendant has requested that this Honorable Court order the State to produce any statements made by the defendant in this case. NRS 174.235(1)(a), which was cited by defendant, requires that the State produce to the defendant all written or recorded statements he made. The State has previously provided the defendant with the audio and video tapes of the interview conducted by Washoe County Sheriff's Detective Michael Matthews on July 9, 1999. Therefore, the State respectfully contends that it has complied fully with the statutory discovery requirements clearly set out in NRS 174.235. Further, the State will honor its continuing duty to produce written and recorded statements made by the defendant in this case.

Further, the State respectfully contends that the defendant's request for an order from this Honorable Court pertaining to oral statements of the defendant which have not been recorded or, obviously, written exceeds his statutory rights to discovery. Additionally, the State is always obligated to provide discovery to the defendant of statement he makes in what ever form he may make it, written, oral, recorded or not if such statement constitutes exculpatory evidence for the defendant. See Brady v. Maryland, 83 S.Ct. 1194, 373 U.S. 83 (1963) and Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998). The United State Supreme Court and the Supreme Court of Nevada have made it clear that the State has a continuing duty to provide discovery to the defendant any and all evidence which may be exculpatory. The State will honor that duty throughout this case.

Based on the argument herein above, the State respectfully contends that the defendant has shown no authority for this Honorable Court to order discovery beyond what is permitted by NRS

174.234 and Brady v. Maryland, supra and Steese v. State, supra. Therefore, the State respectfully requests that this Honorable Court not modify its order of October 4, 1999, to include discovery of any oral statements made by the defendant.

II. WITNESS STATEMENTS

The defendant moves for an order from this Honorable Court that the State produce certain witness statements in addition to those required by NRS 174.234(1)(a) which states in pertinent part:

> 1. ..., the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:
> (a) ..., or any written or recorded statements made by a witness the prosecution intends to call during the case in chief of the state, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;

The defendant argues that as a matter of Constitutional due process, he is entitled to all oral witness statements including the prosecution team's notes of all interviews conducted of all witnesses.

The State respectfully contends that as a matter of Constitutional due process the defendant is entitled to all witness statements, whether oral, written, recorded, or a combination thereof. If such witness statements contain evidence which may be exculpatory. See generally, Brady and Steese, supra. To date, no witness has given to the prosecution team an unrecorded, oral statement containing any exculpatory evidence. If at any time during this case, any and all evidence which may possibly be construed as exculpatory will be discovered to the defendant pursuant to the clear directives set out in these two cases by the Supreme Court of the United States and the Supreme Court of Nevada, respectively.

Additionally, the State contends that requiring the State to discover to the defendant all oral witness statements which have not been recorded and do not contain possible exculpatory evidence is not only not required by either NRS 174.234 or Brady, supra. and Steese, supra., but is a totally unreasonable requirement. If this Honorable Court were to modify its order of October 4, 1999, to include all oral statements as requested by the defendant, the State would have the burden of disclosing all oral

interviews, conversations, and contacts with any potential witness at any time prior to trial. This could easily lead to an absurd result. If the prosecutor on the day of trial, just prior to putting the witness on the stand briefly went over her testimony with her, the prosecutor would have to disclose this witness' oral statement made just before going on the stand. Unless she gave any evidence which might be exculpatory, the State respectfully contends that to discover this to the defendant at that time would be absurd. Further, if the State is required to discover to the defendant all written notes taken by the prosecution team of any interview with any witness, the State respectfully contends that the prosecutor could become a witness to those interview notes should any question arise as to what the witness said during this oral interview. Again, that is an absurd, but clearly probable result of the defendant's motion in this regard.

To avoid this result, the State respectfully contends that by providing the defendant with all recorded statements and transcripts thereof and all written statements of all witnesses who may be called by the State, the defendant is now in a position to interview and discover any additional relevant evidence that these witnesses may have in this case. Moreover, since the State discovered all these materials to the defendant in advance of the preliminary examination, the defendant's attorney was clearly able to conduct a probing and detailed cross-examination of all witnesses called by the State. In that regard, the Supreme Court of Nevada has held that, " Furthermore, Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 960 P.2d at 331. In that case, the Court held that the defense through diligent investigation could have discovered certain telephone records which the defendant contended were exculpatory. The same argument can be made in the instant case. With all of the evidence, including written and recorded witness statements, discovered to the defendant to date, he and his able attorney certainly can conduct a diligent investigation of every aspect of this case.

Based on the legal argument set out herein above, based on NRS 174.234, the State respectfully contends that the defendant is entitled to all statements that are written or recorded of all witnesses the State intends to call in its case in chief. Further, the defendant is entitled to discovery all statements made by any witness in whatever form, if such witness statement contains evidence that might be exculpatory pursuant to Brady, and Steese, supra. Therefore, the State respectfully requests that this

Honorable Court deny the defendant's motion to expand the order of October 4, 1999, pertaining to discovery of all witness statements in whatever form.

III. EXCULPATORY EVIDENCE OR INFORMATION LEADING TO EXCULPATORY EVIDENCE

The State has made its position very clear on its continuing duty to provide discovery to defendant of any and all information and evidence which may be exculpatory. Once again, the State will abide by that solemn duty and requirement. The defendant, however, argues that the 6th Amendment's Confrontation Clause requires that the State disclose all witness statements in whatever form and all notes taken by members of the prosecution team during those interviews. The State will not restate its position on this issue in detail. That is set out herein above at paragraph II. Suffice it to say that the State will honor is obligation to provided discovery in accordance with NRS 174.234 and Brady and Steese, supra.

Further, the defendant requires that this Honorable Court order the State to disclose any agreement with or any kind of compensation paid by the State to any prospective witness. Included in this order would be any agreement the State has with any witness concerning disposition of criminal charges pending against that witness. At present, the State has no agreement with any potential witness pertaining to the disposition of criminal charges pending against that witness. Further, each lay witness will receive the standard, statutory witness fee of $25.00 for testifying at the preliminary examination and for testifying again at the trial.

ACCESS TO ALL ITEMS OF PHYSICAL EVIDENCE FOR THE PURPOSE OF INDEPENDENT EXAMINATION AND TESTING BY QUALIFIED EXPERTS RETAINED BY THE DEFENSE

The State is aware of its responsibility to retain all physical evidence in order to allow the defendant the opportunity to inspect it and to perform any tests on that evidence. Therefore, the State will abide by this obligation in accordance with Crockett v. State, 95 Nev. 859, 603 P.2d 1078 (1979). However, the defendant seeks yet again to place an additional burden on the State by requiring the State to prepare an inventory of all physical evidence in it's possession. This inventory is in addition to all of the information disclosed to the defendant and his counsel through discovery channels. The State respectfully

contends that the defendant and his counsel can exercise due diligence in searching through this discovery to determine the physical evidence, if any, that the State has. This procedure is in accordance with the holding in Steese, supra. Based on the legal argument herein above, the State respectfully requests that this Honorable Court deny the defendant's motion in this regard, except as noted.

SCOPE OF THE DISCOVERY ORDER

Based upon the legal argument contained herein, the State respectfully requests that this Honorable Court not expand the order of October 4, 1999, except to the very limited extent discussed herein above as well. Further, the defendant relies on his version of the holding of the Supreme Court of Nevada in Schlafer v. State, 115 Nev. Adv. Op. 25 (1999). He contends that the Court held that the prosecutor has the duty "to promptly search out, obtain and provide to the defense discoverable information and materials." In Schlafer, supra., the State had used a jail house informant who wrote down notes of his conversations with the defendant, Schlafer, while the two were cell mates. In those conversations Schlafer made statements to the effect that he shot the victim because she cut him off in traffic and not based on self defense as he contended at his trial. Before Schlafer's second trial on the charge of attempted murder, he moved the trial court for an order to have the State produce the jail house informant's notes. The trial court granted that order. The State did not comply with repeated orders from the court to produce these notes until the day the informant testified in the second trial. The Supreme Court of Nevada held:

> Notwithstanding our conclusion that the State's untimely admission of (the informant's) notes did not deprive Schlafer of a fair trial, we nonetheless conclude that the State failed to exercise due diligence in obtaining (the informant's) notes as ordered by the district court.

Schlafer, 115 Nev. Adv. Op. 25, at page 6. The Court went on to chastise the State for its repeated failures to comply with the district court's order to produce notes written by the informant, the existence of which notes was known to the defendant's attorney. The Court did not impose an affirmative and ethical duty on the prosecutor to seek out any and all information and evidence in the case. To be sure, the Court reiterated the State's responsibility to produce any and all evidence which might be exculpatory in accordance with Brady, supra. It should be noted yet again, that this same Court had stated previously that the State is not

required to provide evidence which is available to the defendant through other sources including a diligent investigation. See Steese, supra. Therefore, based on both cases, the Court has not relieved the defendant's attorney of his obligation to diligently investigate the case against his client. Nor has the Court placed the prosecutor in the position of the defendant's investigator.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Witness Unavailable Exercise of 5th Amendment

CODE
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION IN LIMINE: ADMISSION OF PRIOR TRIAL TESTIMONY OF UNAVAILABLE WITNESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

I.

A WITNESS'S ASSERTION OF
HER FIFTH AMENDMENT PRIVILEGE
AGAINST SELF INCRIMINATION RENDERS
HER UNAVAILABLE AS A WITNESS

Ms. Hamilton has asserted her Fifth Amendment rights.

NRS 174.085 provides in part:

> No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V.

The court has raised a concern about the use of prior testimony of Ms. Hamilton on the belief that since Miranda warnings or a judicial admonition of rights was not given, that such testimony is involuntary, and cannot be used against the defendant.

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." This privilege "is fully applicable during a period of custodial interrogation." Miranda v. Arizona, 384 U.S., at 460-461, 86 S.Ct., at 1620-1621. In Miranda, the Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id., at 467, 86 S.Ct., at 1624. Because Miranda warnings may inhibit persons from giving information, the Supreme Court has determined that they need be administered only after the person is taken into "custody" or his freedom has otherwise been significantly restrained. Miranda v. Arizona, 384 U.S., at 478, 86 S.Ct., at 1629. Accordingly, the Court formulated the now-familiar "procedural safeguards effective to secure the privilege against self-incrimination." Id., at 444, 86 S.Ct., at 1612. The Court's fundamental aim in

designing the Miranda warnings was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." Id., at 469, 86 S.Ct., at 1625.

At no time in the investigation, court proceedings, or at any other time has Ms. Hamilton been arrested, detained or in custody. Being summoned to a court is not a functional equivalent for custodial interrogation, otherwise every witness summoned to court is "in custody" for Miranda purposes.

Without custodial interrogation, Miranda does not apply. A state court cannot apply Miranda differently, either by redefining "custody", "interrogation" or "waiver" or by trying to add greater Miranda protection for suspects than the Supreme Court Precedent requires:

> "...a State is free as a matter of its own law to impose greater restrictions on police activity that those this Court holds to be necessary on federal constitutional standards. (Citations). But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them."
>
> Oregon v. Hass (1975) 420 US 714, 719 (reversing on a Miranda impeachment issue).
>
> "By creating an inflexible rule that no implicit (Miranda) waiver can ever suffice, the North Carolina Supreme Court has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution."
>
> North Carolina v. Butler, (1979) 441 US 369, 376.

(See also, Fare v. Michael C., (1979) 442 US 707, 717; reversing California's extension of Miranda invocation rules, California v. Prysock, (1981) 453 US 355, 316; reversing a "flat rule" that Miranda warnings be verbatim. California v. Beheler, (1983) 463 US 1121, 1125, fn. 1; disallowing a state distortion of the concept of custody. Moran v. Burbine, (1986) 475 US 412, fn.3; noting that the states are not free to define the circumstances under which the Sixth Amendment right to counsel attaches.

Therefore, the court should not require additional Miranda warnings be given to a person who is not in custody.

II.

THE DEFENDANT DOES NOT HAVE STANDING TO ASSERT TARA HAMILTON'S FIFTH AMENDMENT RIGHTS AS A WAY TO PREVENT USE OF HER PRIOR TESTIMONY

The right to assert the Fifth Amendment is personal. A third party cannot assert another person's fifth amendment right to silence.

NRS 51.055 states:

> 1. A declarant is "unavailable as a witness" if he is:
> (a) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement;
> (b) Persistent in refusing to testify despite an order of the judge to do so;
> (c) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (d) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance or to take his deposition.
> 2. A declarant is not "unavailable as a witness" if his exemption, refusal, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose or preventing the witness from attending or testifying.

A witness in a criminal prosecution has a right to assert the privilege against self-incrimination. This witness, Ms. Hamilton, previously testified at the preliminary hearing in this matter. Pursuant to Thomas v. State, 967 P.2d 1111, 114 Nev. 1127, (Nev. 1998), the court does not have to "order" the witness to testify as required by NRS 171.198(6)(b), which provides:

> "The [preliminary hearing] testimony so taken may be used ... [b]y the state if the defendant was represented by counsel or affirmatively waived his right to counsel, upon the trial of the cause, and in all proceedings therein, when the witness is sick, out of the state, dead, or persistent in refusing to testify despite an order of the judge to do so, or when his personal attendance cannot be had in court.

Anderson v. State, 109 Nev. 1150, 1152, 865 P.2d 331, 333 (1993) laid out the three requirements of using preliminary hearing testimony at trial: (1) the defendant was represented by counsel; (2) defendant's counsel had an opportunity to cross-examine the witness at issue; and (3) the witness is unavailable).

No dispute exists that this defendant was represented by the same counsel, that his attorney cross-examined Hamilton, or that Hamilton is persistent in refusing to testify. In the Thomas case

counsel argued that the witness Hall was not "unavailable" pursuant to NRS 171.198(6)(b) because the district court specifically stated:

> "Well, I'm not going to order him to testify. [Hall] said he's going to invoke his [F]ifth [A]mendment right. So he'll have to--as far as I'm concerned, that's what he did. That's what he said on the--on record here, so I don't think there is any purpose in it. That's the end of that."

The district court ruled that Hall invoked his Fifth Amendment right against self-incrimination and was therefore unavailable pursuant to Funches v. State, 944 P.2d 775, 113 Nev. 916, (Nev. 1997);NRS 51.055(1)(a), and NRS 171.198(6)(b).

The prosecutor may choose not to grant the witness immunity. NRS 178.572 permits the court to grant a witness immunity "on motion of the state." McCabe v. State, 98 Nev. 604, 606, 655 P.2d 536, 537 (1982), states: "The granting of immunity is traditionally a function of the prosecution".

Additionally, the supreme court has stated that a witness invoking his or her Fifth Amendment right against self-incrimination is not necessarily a ground for granting immunity.

CONCLUSION

Therefore, the State requests that the preliminary hearing transcript of the unavailable witness be admitted.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Witness Unavailable Prelim Transcript

CODE
Richard A. Gammick
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The testimony of a witness taken at preliminary hearing may be used at trial in criminal cases if the defendant was represented by counsel, and the witness subsequently becomes unavailable. NRS 171.198(6)(b) states in pertinent part,

> 6. The testimony so taken [by a court reporter which is reduced to writing and authenticated] may be used:
>
> (a) By the defendant; or
>
> (b) By the state if the defendant was represented by counsel or affirmatively waived his right to counsel, upon the trial of the cause, and in all proceedings therein, when the witness is sick, out of the state, dead, or persistent in refusing to testify despite an order of the judge to do so, or when his personal attendance cannot be had in court.

This statute has been applied and expanded through case law in Nevada.

In the case of Drummond v. State, 86 Nev. 4 (1970), the Court set forth three preconditions which must be met in order for the transcript of the testimony of a material witness given at a preliminary hearing to be received into evidence: "first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." In accord, Funches v. State, 113 Nev. 916 (1997); Anderson v. State, 109 Nev. 1150 (1993); Aesoph v. State, 102 Nev. 316 (1986).

NRS 51.055 relates to when a witness is considered unavailable to testify. It states,

> 1. A declarant is "unavailable as a witness" if he is:
>
> (a) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement;
>
> (b) Persistent in refusing to testify despite an order of the judge to do so;
>
> (c) Unable to be present or to testify at the hearing because of death **or then existing physical or mental illness or infirmity**; or

(d) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance or to take his deposition.

2. A declarant is not "unavailable as a witness" if his exemption, refusal, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying. (Emphasis added).

Further, NRS 51.325 states,

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, is not inadmissible under the hearsay rule if:

1. The declarant is unavailable as a witness; and

2. If the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same.

The Drummond case, *supra*, does not impose any requirement on the type of cross-examination that takes place at preliminary hearing. Thus, cross-examination by the defense at preliminary hearing does not have to have taken the place of the actual trial cross-examination. The only requirement is that the three-pronged test stated above be satisfied in order to meet an accused's Sixth Amendment right to confrontation as applied to the States through the 14th Amendment. See, Funches v. State, supra; Anderson v. State, supra; and Aesoph v. State, supra.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Writ of Habeas Corpus Timeliness

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION OF

FOR A WRIT OF HABEAS CORPUS

POINTS AND AUTHORITIES IN OPPOSITION TO WRIT OF HABEAS CORPUS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, and ELLIOTT A. SATTLER, II, Deputy District Attorney, and files these POINTS AND AUTHORITIES IN OPPOSITION TO WRIT OF HABEAS CORPUS (hereinafter, "Opposition"). The Opposition is pursuant to City of Reno v. Forrest, 87 Nev. 6 (1971), Sereika v. State, 114 Nev. Adv. Op 18 (1998), Walsh v. State, 110 Nev. 1385 (1994), NRS 174.085(5), all the pleadings, papers and authorities on file with this Court, and any oral argument the Court deems necessary.

The petitioner, (hereinafter, "petitioner") has filed a WRIT OF HABEAS CORPUS, and accompanying paperwork (hereinafter, "the Writ"). The Writ is untimely, and should be dismissed without consideration by this Court. The Nevada Supreme Court has addressed the untimely filing of Writs of Habeas Corpus in City of Reno v. Forrest, 87 Nev. 6 (1971). In Forrest, the Court states:

> It is a settled principle of law that a writ of habeas corpus may not be used to interfere with or interrupt the orderly administration of the criminal laws by a competent court acting within its jurisdiction or as a substitute for the ordinary proceedings of a trial court.
>
> * * *
>
> Unless extraordinary circumstances exist, a writ of habeas corpus will issue only when all other adequate remedies have been exhausted. Cf. Cook v. State, 85 Nev. 692, 462 P.2d 523 (1969), and Prescott v. State, 85 Nev. 448, 456 P.2d 450 (1969).

> The appellant has not exhausted his adequate remedy, i.e., a trial in municipal court. * * *

Forrest, 87 Nev. at 8-9 (citing Hittlet v. Police Chief, City of Reno, 86 Nev. 672, 474 P.2d 722 (1970)).

In the instant case, the petitioner is not entitled to have this Court consider the Writ because he has not exhausted his adequate remedies. The petitioner has not demonstrated that he has filed a Motion to Dismiss for Lack of Jurisdiction in the Justices Court. Clearly, the Justices Court would have jurisdiction to consider such a motion, if filed, and grant the relief requested if warranted. The petitioner is not entitled to the extraordinary relief of a writ of habeas corpus until he has taken this remedial step.

Should this Court feel that the issue presented in the Writ is presently ripe for consideration, the State will point out that the Writ is not well founded in fact or law. The language of NRS 174.085(5) is clear on its face. It permits a criminal complaint to be filed and dismissed without stating any grounds for dismissal. The prosecutor may then re-file the same charge and summons the defendant to court. This is exactly what has happened. The petitioner was charged by way of criminal complaint on November 25, 1998. That charge was dismissed pursuant to NRS 174.085(5). An identical charge was re-filed and the defendant was issued a summons to appear on February 3, 1999. This procedure complies directly with the language of NRS 174.085(5).

> The Nevada Supreme Court has stated:
> The general principles of statutory construction are straightforward. "It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act." McKay v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438, 440 (1986). "[N]o part of a stature should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided." Paramount Ins. v. Rayson & Smitley, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)(citation omitted).

Walsh v. State, 110 Nev. 1385, 1388 (1994). The Court also has stated, "[t]his court has declared that statutory interpretation should avoid absurd or unreasonable results." Sereika v. State, 114 Nev. Adv.Op 18, p. 7 (1998).

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney